TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 48.

J. E. EUBANK, PLAINTIFF IN ERROR,

vs.

THE CITY OF RICHMOND.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED MAY 7, 1910.

(22,144)

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THE CITY OF RICHMOND.

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1 In the Supreme Court of Appeals of Virginia, at Richmond.

EUBANK
v.
CITY OF RICHMOND.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, J. E. Eubank, respectfully represents that he is aggrieved by the judgment of the Hustings Court of the City of Richmond, entered on the 28th day of April, 1909, imposing a fine of $25.00 upon him, for an alleged violation of an ordinance of the City of Richmond, passed on the 7th day of December, 1908 (record, p. 6), for failure to construct his dwelling house, on his own land in said city on East Grace Street, No. 2803, so that the octagon bay, or bay window, a part of said house, should be at least fourteen feet south of the south side of said street line, although the said J. E. Eubank had applied to the city building inspector and received a permit to erect his said dwelling house, on December 21st, 1908 (record, p. 7), from which permit it is proved by the evidence, and not disputed, that he has in all respects complied with all of its conditions, restrictions and provisions.

Your petitioner had been fined the same amount by the Police Justice of the City of Richmond for the same alleged violation of the provisions of said alleged ordinance, and the trial in the Hust-
2 ings Court was on an appeal from said fine, the action of the Hustings Court being an affirmance of the judgment of the Police Court.

The facts proved and admitted at the trial fully appear in the bill of exceptions. They are that, on December 21st, 1908, J. E. Eubank received from Building Inspector Beck, the permit to erect a dwelling house in the City of Richmond, to be numbered as 2803 East Grace Street, the permit being accompanied by plans and specifications. The plans showed a dwelling house to be erected with a bay window on a line about fourteen feet from the street line.

On December 7th, 1908, the mayor of the city had approved the ordinance authorizing two-thirds of the abutting property owners on any street, on request in writing made to the Street Committee, to establish a building line not less than five feet nor more than thirty feet from the street line, the object and purpose of the ordinance manifestly being to have the private property up to the building line of individual owners left vacant.

On January 9th, 1909, in pursuance of this ordinance, the Street Committee met and on the petition of two-thirds of the property owners, not on Grace Street, as provided for in said ordinance, but of those residing on the south side of that square, attempted to establish such a building line by passing a resolution providing that the building line so established was "to be on the line of the majority

of the houses now erected on the said south side of Grace Street, between 28th and 29th Streets." (Record, p. 12.)

The petition on which this supposed line was attempted to be fixed was not accompanied by any survey or plat, so that said line could be any more definitely fixed. (Record, p. 19.) On the same day Building Inspector Beck, informed J. E. Eubank by letter of the action of the Street Committee, stating:

"* * * * this building line is about 14 feet from the true line of the street, and on a line with a majority of the houses on this block. All portions of your house, including octagon bay, must be set back to conform to this line." (Record, p. 15.)

Thereupon, J. E. Eubank appealed to the Board of Public Safety for relief, but that body held that it was without power to act. (Record, p. 16.) He proceeded with the erection of the said house and was, thereupon, fined $25.00 in the Police Court. The case is now before this court by appeal from the judgment of the Hustings Court. The manifest object of the ordinance is to establish a building line, not for the health, safety or morals of citizens or property owners, but so that the appearance of the street may not be
3 "offensive to the eye or cultivated taste" of owners and occupants of estates. See Bristol v. Bristol, 97 Va. 309.

It is conceded that this dwelling house has now been practically completed, in accordance with the terms of the permit of December 21st, 1908, and that in all respects it has been constructed in accordance with said permit, the only controversy being as to whether J. E. Eubank is subject to fine for having the bay window of the house on his own lot less than about "14 feet" from the street line. The street line referred to is the line beginning at the south side of the sidewalk.

As to the law, it is contended that if it is constitutional, the Street Committee has no power to fix such building line on private property, because the General Assembly, Acts 1908 (amending Code of Va. (1904), sec. 1038), p. 624, has authorized the City Council to "prescribe and establish building lines," and that body has no power to delegate this authority to the Street Committee. Page v. Belvin, 88 Va. 990; McCrowell v. Bristol, 89 Va. 666. These cases have been cited as authority all over the Union. See 28 Cyc. 277.

The contention of the city, however, is that, under the police power this is a valid ordinance. That contention cannot be maintained because it is universally conceded that a municipality cannot delegate or surrender its police power. The law is correctly stated in 28 Cyc. 694:

"In general potestas delegata non est delegari is a maxim applicable with peculiar force to any form of sovereign power, and operates to prevent the governing body of a municipal corporation, intrusted by the State with the police power, from delegating its high functions to any other body or officer—even to the mayor or other member of the body, the trust is official and personal and may be discharged only by those to whom the State commits it."

That is the rule, and the only exception to this is where there is express legislative authority for such delegation.

The Act of 1908 (page 624), does not even hint at such a delegation. It only provides that the Council may establish building lines. It does not provide that the Council may establish building lines on private property. Petitioner's case is not within the police power.

For these reasons, under the Page v. Belvin case, the ordinance is void.

But there can be no doubt that the State Legislature is without the power to pass any such law as, is contended by the city attorney, was passed, and, of course, cannot confer it upon the City Council.

4 By the common law the owner of real estate has the right of unlimited ownership "upwards as well as downwards." 2 Bl. Comm. 18. Petitioner, J. E. Eubank, is the fee simple owner of the lot out to the street line. The right to acquire, hold and dispose of property is declared by the Constitution to be inherent in the individual and inalienable. Any attempt by statute or ordinance to interfere with this right is unconstitutional, unless the public health, morals or safety require such otherwise unwarranted interference. 8 Cyc. 886, sec. 1, Va. Bill of Rights; Young's case, 101 Va. 863.

In the argument of the case the city attorney realized the force of this contention and attempted to drag in the health theory of the police power, just as was done in the Ragland case at the corner of Fifth and Grace Streets. (Unreported.) And there, where the building was out to the street line, the Court of Appeals refused to allow an appeal. If the court would not allow an appeal on that ground where the building line was out to the street line, surely it would not consider such an allegation as serious in a case involving a bay window at least eleven feet from the street line.

The true rule of construction in cases of this character is laid down in the famous case of Mugler v. Kansas, 123 U. S. 661–663. The court there says:

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look to the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of the rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."

The construction to be put on petitioner's case, if the court is in doubt, must be in favor of his common law rights and against the validity of the statute or ordinance. 1 Dill Mu. Corp., 4th Ed., sec. 91; 2 Sutherland on St. Const., sec. 573; 26 Am. & Eng. Encyc. of Law, 662.

In cases of this character the rule is well settled that, while the construction is to be just, "yet any ambiguity or doubt as to the extent of the power" is to be determined against the city. Bostock v. Sams, 59 L. R. A. 285.

The Court of Appeals of Virginia, in the case of Bristol v. Bristol, 97 Va. 309, says:

5 "There are many unpleasant, and indeed offensive things that must be borne with by the owners and occupants of estates, because, although offensive to the eye or cultivated taste, they do not touch upon any recognized legal right, and this is the case, even though the thing complained of materially lessens the value of surrounding property."

The testimony in this case shows that petitioner's house, which has now been completed, is an ornament to the neighborhood and greatly adds to the value of his neighbors' property. (Record, p. 21.) But Virginia courts do not recognize what is known as "æsthetic legislation." See article "Bill Boards and Sky Signs," Michigan Law Review (March, 1909), pp. 423, 424. It is there stated that ordinances of that character have been universally condemned as infringements of property rights. Wineberg Adv'g Co. v. Edward S. Murphy, N. Y. Law Journal, April 8th, 1909.

The ablest writer on constitutional law this country ever produced, aptly says:

"And a by-law which assumes to be a police regulation, but deprives a party of the use of his property without regard to the public good, under the pretense of the preservation of health, when it is manifest that such is not the object and purpose of the regulation, will be set aside as a clear and direct infringement of the right of property without any compensating advantages." Cooley Const. Lim., 6th Ed. 247.

See also the opinion of Mr. Justice Miller, Yates v. Milwaukee, 77 U. S. (10 Wallace), 504; Crawford v. Topeka, 20 L. R. A. 694.

Many courts have held that the city is without power to modify a building license after granting the same. Lowell v. Archambault, 1 L. R. A. (N. S.), 460.

Most diligent investigation has failed to show that the attempt to establish a building line on private property, without compensation, was ever before made in any State. Williams v. Parker, 188 U. S. 491.

Paternalism and socialism are abhorrent to the common law and contrary to the genius of our institutions. Bennett v. Vallier, 17 L. R. A. (N. S.) 491, 496, holding an ordinance relating to boarding houses void because it deprived a man of his property without due process of law. This is a Wisconsin case, decided in June, 1908, and is conclusive of the case at bar.

There never was before a law drawn, nor attempted to be drawn in this State, which undertook to forbid a citizen from erect-

6 ing a dwelling house on his own land unless he first located it so as to please the "cultivated" or "æsthetic" tastes and thereby obtained the consent of at least two-thirds of his immediate neighbors.

On both points it seems clear that the ordinance is unconstitutional and therefore void. The Legislature was without authority to enact such a statute as it is claimed it did enact, and the City of Richmond cannot pass such ordinance and by that means deprive a

citizen of property without due process of law and without compensation. It is of great importance to the individual citizen, for it deprives him of all constitutional guarantees for the protection of his property—it may be, even without any notice at all. The so-called ordinance does not even provide for notice to any one except two-thirds of the property owners; the other third are outside of this so-called law. Heretofore, in America, all laws have followed the principles of eminent domain and ample provision has been made for compensation where the property was taken for public use. To refuse to permit any building to be erected on ground privately owned, is an unlawful taking of property. Except for sky signs and bill boards, no act has ever passed a legislative body on such a broad "æsthetic" basis in an Anglo-Saxon country, and those acts, as has been above pointed out, have been declared to be void.

The trial court erred in holding the city ordinance valid and in imposing a fine on petitioner. Its ruling is in direct conflict with the decisions, both State and Federal, and against Fourteenth Amendment to the Constitution of the United States.

For these and other reasons to be stated at the bar, your petitioner prays for a writ of error and supersedeas to the aforesaid judgment of the Hustings Court of the City of Richmond.

J. E. EUBANK,
By Counsel.

S. S. P. PATTESON,
For Petitioner.

I, the undersigned counsel, practicing in the Supreme Court of Appeals of Virginia, am of the opinion that the judgment complained of in the foregoing petition is erroneous and should be reviewed in said court.

S. S. P. PATTESON.

Richmond, Virginia, May 20th, 1909.

Received May 20, 1909.

R. H. C.

7 Writ of error and supersedeas. Bond, $100.00.

R. H. CARDWELL.

To the clerk of the Supreme Court of Appeals, Richmond, Va.

STATE OF VIRGINIA.
City of Richmond, To wit:

Pleas at the Courthouse of the City of Richmond Before the Hustings Court of Said City on the 7th Day of May, 1909.

Be it remembered that on the 1st day of March, 1909, J. E. Eubank filed in the clerk's office of said court his appeal from a judgment of the police justice of said city convicting him of a violation of an ordinance of said city and imposing upon him a fine

of twenty-five ($25.00) dollars, as set forth in the summons awarde by the said police justice, which summons is in the words and figure following, to-wit:

CITY OF RICHMOND, *To wit:*

To any police officer of said city:

Summon J. E. Eubank (2803 E. Grace St.) 2623 E. Broad Street, to appear before me or some other justice of the peace of said city, at the police justice's court, in the City Hall, on the 30th day of ——, 190–, at the hour 9:30 o'clock A. M., to show cause, if any he can, why a fine of not less than twenty-five nor more than five hundred dollars should not be imposed on him for violation of Ordinance of said city in relation to the establishment of a building line, approved December 7, 1908. And be you then there to certify what you have done in the execution thereof.

Given under my hand and seal in said city this 28th day of January, 1909.

JOHN J. CRUTCHFIELD, [SEAL.]
Police Justice.

8 The following is a copy of the Judgment of said Police Justice:

In the Police Justice's Court, City of Richmond.

WEDNESDAY, *February* 17, 1909.

I, John J. Crutchfield, police justice of said city, do certify that upon a hearing of the charge as within set forth against the said J. E. Eubank, I adjudge him, the said J. E. Eubank, guilty of the violation of said ordinance, and imposed upon him a fine of twenty-five ($25.00) dollars and cost, and gave judgment accordingly, and the said J. E. Eubank having prayed an appeal from my said judgment, an appeal from my said judgment is granted the said J. E. Eubank to the next term of the Hustings Court.

Given under my hand this 17th day of February, 1909.

JNO. J. CRUTCHFIELD,
Police Justice.

And at another day at a Hustings Court held for said city in the courthouse on the 28th day of April, 1909, came the City of Richmond by H. R. Pollard, City Attorney, as well as the defendant, by S. S. P. Patteson, his attorney, and neither party requiring a jury, the whole matter of law and of fact is submitted to the judgment and decision of the court, and the court having heard the evidence, it is considered that the judgment of the police justice be affirmed and that the City of Richmond recover against the said J. E. Eubank a fine of twenty-five ($25.00) dollars.

To which action of the court in giving judgment against the de-

fendant, the defendant by his attorney, excepted, and ten days' time is allowed him to prepare his bill of exceptions.

The execution of the said judgment is suspended, however, at the request of the defendant for a period of thirty days from this day in order to allow him time to apply to the Supreme Court of Appeals of Virginia for a writ of error and supersedeas to said judgment.

And now, at this day, to wit, at a like Hustings Court, continued by adjournment and held for the said city at the courthouse on the 7th day of May, 1909, the said defendant in accordance with the leave of the court heretofore granted him, tendered to the court his bill of exceptions, which is received, signed and sealed by the court and made a part of the Record hereof and is in the words and figures following to-wit:

9 VIRGINIA:

In the Hustings Court of the City of Richmond.

J. E. EUBANK
v.
CITY OF RICHMOND.

Bill of Exceptions.

Be it remembered that, at the trial of this cause, neither party demanding a jury for the trial of the same, but agreeing that the whole matters of law and fact, might be heard and determined by the court, the City of Richmond, to sustain the issue on its part, introduced the following evidence:

The following Ordinance, admitted to be a correct copy of the City Ordinance under which the fine was imposed:

An Ordinance.

(Approved December 7, 1908.)

To authorize and require the Committee on Streets to establish a building line on such squares of the city on which the owners of two-thirds of the property abutting thereon shall request the establishment of the same and to prohibit the granting of a permit by the building inspector for the erection of any building nearer to the street line than the line so established.

Be it ordained by the Council of the City of Richmond:

1. That wherever the owners of two-thirds of the property abutting on any street shall, in writing, request the Committee on Streets to establish a building line on the side of the square on which their property fronts, the said committee shall establish such line so that the same shall not be less than five (5) feet nor more than thirty (30) feet from the street line, and upon the establishment of such building line, it shall be the duty of the Committee on Streets to

certify that fact to the Building Inspector of the City of Richmond, who shall record the same in a book in his office to be kept for that purpose, and no permit for the erection of any building upon such front of the square upon which such building line is so established shall be issued except for the construction of houses within the limits of such line.

2. Any person constructing a building nearer to the street line than the building line established by the authority of this
10 ordinance, shall be liable to a fine of not less than twenty-five nor more than five hundred dollars for each offence, recoverable before the Police Justice of the City of Richmond.

3. This ordinance shall be in force from its passage.

A true copy:

BEN T. AUGUST,
City Clerk."

and H. P. Beck, the City Building Inspector, testified that he granted the permit, dated December 21, 1908, which is in the words and figures following to-wit:

"*Permit to Build.*

No. 872. OFFICE OF THE BUILDING INSPECTOR,
RICHMOND, VA., *December* 21, 1908.

To Mr. J. E. Eubank:

In compliance with your application of December 19, 1908, you are hereby granted a permit to build, a detached brick building to be used for a dwelling, and you are fully authorized herewith to proceed with the construction of the aforesaid building on the south side of Grace Street, between 28th Street and 29th Street and known as No. 2803 E. Grace Street, in strict accord with the plans and specifications as approved by the building inspector on the 21st day of December, 1908, and now on file in this office.

Kind of structure—dwelling, (one).
Material to be used—brick.
Number of stor-es—two.
Dimensions—26x59x28 feet high.
Roof to be—tin.
Name of contractor—James Fox and Sons.

The work to be done under this permit must be commenced within thirty days from this date.

The owner or his contractor must comply with the existing ordinances as to the use and occupation of the streets in front of these premises and to such other restrictions, as to their use as the building inspector may deem wise or expedient.

Before commencing work, the owner or his contractor
11 must provide suitable and proper conveniences for the use of his workmen, and these places must be kept in such a manner as not to be objectionable to persons in the vicinity.

Violations of any of these conditions shall be deemed sufficient cause for the revocation of this permit.

Provide parapets on side walls and furnish detail for same.

H. P. BECK,
Building Inspector."

and that the same was accompanied by plans and specifications which were approved by said building inspector; that the Street Committee of the City Council of Richmond met, on January 9, 1909, and, on the following petition of two-thirds of the property owners on the side of the square on which the house of J. E. Eubank is situated, to-wit:

"RICHMOND, VIRGINIA, *January* 9, 1909.

Committee on Streets met in special called session in room No 5, third floor, City Hall, this 9th day of January, 1909, and — 2:45 o'clock P. M. in the absence of both the chairman and sub-chairman, were called to order by the clerk.

The roll being called the following members answered to their names:

Messrs. Bliley, Jno. B., Davis, C. P., Furgusson, E. H., Gilman, W. J., Powers, Jos. E., Gunst, Marx., Richards, C. E., Richardson, E. D., Bolling, Chas. E., City Engineer.

Mr. C. E. Richards nominated Mr. Marx Gunst as chairman pro tem and he was duly elected and assumed the duties of the chair.

It was stated that the meeting had been called by Chairman W. H. Adams, to consider a petition for the establishment of building line on the south side of Grace Street, between 28th and 29th Streets. This statement was made by Mr. G. C. Ruskell, sergeant at arms.

Messrs. W. H. Adams, Jno. J. Lynch, Rob't Whittet, Jr., and G. K. Pollock appeared and were seated.

And Mr. Wm. H. Adams, chairman, assumed the duties of the chair.

12 The following petition was presented by Mr. C. E. Richards.

"To the Honorable Committee on Streets of the City of Richmond:

The undersigned owners of more than two-thirds of the property abutting on the south side of Grace Street, between 28th Street and 29th Street, the exact location *and* of which property will fullly appear on the plan on file in the city engineer's office, a blue print copy of which is hereto, hereby request you, in pursuance of an Ordinance approved December 7, 1908, entitled an ordinance to require the Committee on Streets to establish a building line on such squares of the city on which the owners of two-thirds of the property abutting thereon shall request the establishment of the same and to prohibit the granting of a permit by the building inspector for the erection of any building nearer to the street line than the line so established, "to establish*ed* a building line on the south side of Grace Street, between 28th Street and 29th Street, so that the same may not be less than five (5) nor more than thirty (30) feet from

the street line, and certify the fact of the establishment of said line to the building inspector of the City of Richmond as required by said ordinance.

Respectfully,

(Signed)	JAS. T. SLOAN & R. H. HARWOOD.	31.4 Ft.
"	A. E. WALSH.	40 "
"	JOS. E. BATKINS.	20 "
"	JOS. E. BATKINS.	32 "
"	EMMA E. LEDMAN.	31 "
"	BENNETT GALLAGHER.	22 "
"	HENRY S. WALLERSTEIN.	23 "
"	S. L. THOMAS.	23 "

Mr. Richardson moved to refer to Ward Committee and City Engineer.

No action was taken on this. It seemed to be understood that the motion was withdrawn.

13 This certifies that lots of land as per annexed plat are so charged on the Land Books in this office.

(Signed) O. A. HAWKINS, *C. R.*"

Alley.	Sloan & Harwood	31.4
	E. Eubank	33
	Walsh	20
	Batkins	20
	Walsh	20
	Prosser	39
	Ledman	31
	Gallagher	22
	Wallerstein	23
	Thomas	23

14 Mr. C. E. Richards offered the following resolution:

"Be it resolved by the Committee on Streets of the City of Richmond, that in accordance with an Ordinance approved by the Mayor, December 7, 1908, entitled an Ordinance "to authorize and require the Committee on Streets to establish building line, etc, etc." and in accordance with the petition of the owners of more than two-thirds of the property fronting on the south line of Grace Street, between 28th Street and 29th Street, to have a building line established on said block, the Committee on Streets do hereby establish a building line on said south side of Grace Street between 28th Street and 29th Street, the said line so established to be on the line of a majority of the houses now erected on the said south side of Grace Street between 28th and 29th Streets.

The clerk of the Committee on Streets is hereby directed in accordance with said ordinance to notify the building inspector of the City of Richmond of this action of the Committee on Streets.

Which motion was adopted and by the following vote:

Ayes: Messrs. Davis, Fergusson, Gilman, Gunst, Lynch, Powers, Jos. E. Richards, C. E. Richardson, Whittet, and Chairman W. H. Adams—10.

Noes: Bliley, Jno. B., and G. K. Pollock—2.

The clerk stated before action was taken on the motion that "No plan was on file in the office of the city engineer, nor did any blue print accompany the application as stated in said application."

On motion of Mr. W. J. Gilman the committee adjourned.

J. TAYLOR STRATTON, *Clerk.*
W. H. ADAMS, *Chairman.*

I certify that this is a correct copy of the proceedings of the Committee on Streets of January 9, 1909.

J. TAYLOR STRATTON,
Clerk Committee on Streets.

Richmond, Va., March 25, 1909."

Adopted the resolution which appears in the following letter dated January 9, 1909, addressed to said H. P. Beck, Building In-
15 spector, and signed by J. T. Stratton, Clerk Committee on Streets, which letter is as follows:

"RICHMOND, VA., *January* 9, 1909.

H. P. Beck, Esq., Building Inspector, City of Richmond, Va.

DEAR SIR: I respectfully notify you that the Committee on Streets have this 9th day of January, 1909, adopted the following resolution:

"Be it resolved by the Committee on Streets of the City of Richmond that in accordance with an Ordinance approved by the Mayor December 7, 1908, entitled, an Ordinance "to authorize and require the Committee on Streets to establish a building line, etc., etc., and in accordance with the petition of the owners of more than two-thirds of the property fronting on the south line of Grace Street, between 28th and 29th Streets, to have a building line established on the said block, the Committee on Streets do hereby establish a

building line on said south side of Grace Street, between 28th and 29th Streets said building line so established to be on the line of the majority of the houses now erected on the said south side of Grace Street, between 28th and 29th Streets. The clerk of the Committee on Streets is hereby directed in accordance with said Ordinance to notify the Building Inspector of the City of Richmond of this action of the Committee on Streets.

Very respectfully,
(Signed) J. T. STRATTON,
Clerk Committee on Streets."

I hereby certify that this is a true copy of the records."
January 11, 1909.
Tests:

GEORGE I. BYRNE,
Clerk Building Inspector."

16 that thereupon the said H. P. Beck wrote the following letter to said J. E. Eubank:

"RICHMOND, VA., *January* 9, 1909.

Mr. J. E. Eubank, No. 2623 East Broad Street, City.

DEAR SIR: At a meeting of the Street Committee, held this day, a building line was established for the south side of Grace street, between 28th and 29th Streets.

This building line is about fourteen (14) feet from the true line of the street, and on a line with the majority of the houses on this block. All portions of your house including Octagon Bay must be set back to conform to this line.

Please govern your operations on this house to conform to this "Ordinance."

Yours truly,

H. P. BECK,
Building Inspector."

which was that day delivered to him at his residence on Church Hill late in the evening.

H. P. BECK testified that his attention was drawn to the bay window on the specifications, at the time the permit was granted, on December 21, 1908, and that at that time the said Ordinance had not been passed on the subject of building lines: that a part of the material had been assembled for the construction of said dwelling house, at the time the ordinance was passed, but no actual construction work had been done on said building.

H. P. Beck also produced and read a copy of the proceedings had by the Board of Public Safety on the 18th and 20th of January, 1909, which is as follows:

"The Board of Public Safety of the City of Richmond, Va., met in the office of the Mayor, Monday, January 18, 1909, to consider the appeal of J. E. Eubank taken from the decision of the building

inspector, in directing him to conform his operations on the house which he contemplated erecting in accordance with the "Building Line" as established by the "Committee on Streets," January 9, 1909.

The Board of Public Safety was unable to take any action in the matter on account of the absence of Mr. Chas. E. Bolling,
17 City Engineer, one of the "Members" of the "Board" and adjourned until Wednesday, January 20, 1909, at 4:00 P. M.

Approved:
(Signed) D. C. RICHARDSON, *Chairman.*

The Board of Public Safety of the City of Richmond, Va., met in the office of the Mayor, Wednesday, January 20th, at 4:00 P. M. to consider the appeal of J. E. Eubank, adjourned from Monday January 18, 1909.

After hearing the evidence for and against the same, the following resolution was adopted:

"Acting under the law and the facts in the case, the Board of Public Safety unanimously sustains the Building Inspector in refusing the "Permit to Build" except in the manner as required by his letter of January 9, 1909.

Approved:
(Signed) D. C. RICHARDSON, *Chairman.*

I hereby certify that this is a true copy of the records.
Teste:

GEORGE I. BYRNE,
Clerk of Board of Public Safety.

February 1, 1909."

He also testified that, with the exception of the bay window, extending out some three feet over the building line which is about fourteen feet from the street line, the said dwelling house of J. E. Eubank in every way complies with the city ordinances and the permit; that an Octagon Bay Window, constructed on the plan provided for in the plans and specifications would be and was to all intents and purposes a part of the building itself, and not a mere pendage thereto, such as a porch, veranda or other similar structure would be.

The said H. P. Beck also testified that at the time the permit was granted, the said J. E. Eubank signed the following application for same, to-wit:

No. of brick required — M. Permit No. 872.

18 *Application for Permit to Build.*

(Fill out with pen and ink.)

RICHMOND, VA., *December* 19, 1908.

To H. P. Beck, Building Inspector:

The undersigned owner hereby applies for a permit according to the following specifications:

Before commencing work the builder or the owner must have the street lines established by some civil engineer, who must be satisfactory to the City Engineer.

Should any building project into the street, the owner will be required to remove any or all encroachments beyond the street lines.

1. What is the owner's name? J. E. Eubank. Address, 27th and Broad Streets.
2. What is the architect's name? Carl Ruhrmond.
3. What is the builder's name? James Fox and Sons. Address, 205-207 Mayo Street.
4. What is the house number? 2803 E. Grace Street.
5. Has a plat been filed in this office showing the shape and size of the lot with the building located thereon?
6. State how many buildings to be erected? One.
7. Number of stories in height? Two.
8. Material. Brick.
8. If of frame, will the proposed structure be within 24 feet of any brick building?
9. Size of lot: Front, 34 ft. 1 in. Rear, 33 ft. 10 in. Depth, 111 to 4 ft. alley.
10. Size of main building: Width of front, 26 ft.; number of feet deep, 59 ft.; number of feet high, 28 ft.
11. Size of shed building: Number of feet wide, —; number of feet long, —; number of feet high, —.
12. What is the purpose of the building? Dwelling.
If a dwelling, for how many families? Two.
13. Will there be a store in the lower story? No.
Nature of business to be conducted?
14. Will the building be erected on solid or filled land? Solid. Material of foundations? Brick.
15. Thickness of external walls: To first floor level, 13″; first story, 13″; second story, 9″; third story, —.

19

16. Thickness of party walls: To first floor level, —; 1st story, —; 2nd story, —; 3rd story, —; 4th story, —; 5th story, —; 6th story, —; 7th story, —; 8th story, —; 9th story, —.
17. What will be the material of the front? Brick. If stone, what kind? —.
18. Will the roof be flat, pitch, or mansard? Flat.
Material of roofing? Tin. Access to roof? Manhole.
19. Will there be any projections beyond the building line? No. Have they been authorized?
20. Are there any bay windows? Yes. Height, 28 ft.; width, 12 ft.; projection, 3.
21. Are there any tower projections? No. Height? —. Width? —. Projection? —.
22. Are there any vaults? Depth? —. Length? —. Width? —.
23. Will there be an area? No. Width? —. Projection? —. How protected? —.
24. Are there any elevator shafts? No. How protected? —.
25. How will the building be heated? Stoves.

Will the building be wired for electric lighting or power? Yes?

26. What is the height of the first floor above sidewalk? 3.
Distance of the building from the street line? 14 feet.
27. Has the curb grade been obtained from the City Engineer? Yes.
28. What is the estimated cost of improvements? $4,200.00.

N. B.—No projection of any kind, viz: vault, areaway, steps cellar doors, balconies, bay windows, oriels, marquises, tower projections, etc., which may be beyond street line, is included or authorized in the permit under this application.

Signature of owner.....J. E. Eubank.
Address.....2623 E. Broad Street.
Signature of applicant.....J. E. Eubank.
Address.....2623 E. Broad Street.

I hereby testify that Mr. J. E. Eubank is the owner of the real estate upon which the above referred improvements are to be made.

CHAS. O. SAVILLE,
Clerk Chancery Court.

Dec. 21, 1908.

20 Two copies of the specifications and duplicate blue or black print copies of the plans must accompany this application.
Approved December 21, 1908.
Under the provisions of the ordinance of July 25th, 1908.

H. P. BECK,
Building Inspector.

I hereby certify that this is a true copy of the "Records."
Teste:
GEO. I. BYRNE,
Clerk of Building Inspector.

January 30, 1909."

J. T. STRATTON, another witness for the City of Richmond, testified that he was a clerk in the office of the City Engineer, and that there was no blue print accompanying the petition of the property owners, nor any map, plan, or survey, and that none was produced before the Street Committee, at the time of the passage of the said resolution, for the esta-lishment of said building line on said square, "other than the plan shown on the petition of the property owners, signed by James T. Sloan, R. H. Howard, and others, showing the location and frontage of the property owners on the square along the front of which it was proposed to establish said building line, which plan is signed by O. A. Hawkins, C. R."

C. E. RICHARDS, a member of the Committee on Streets, and JAMES T. SLOAN, another witness, both testified that the owners of more than two-thirds of the property abutting on the south side of Grace Street, between 28th and 29th streets, had in writing requested the Committee on Streets to establish a building line on the side of the square on which their property fronts.

And the said C. E. Richards testified that in conversation with the said J. E. Eubank, held in evening at the store of the said Eubank, and before the establishment of the building line and before the meeting of the Street Committee (but the evening that it met) at which that line was established, the said Eubank told him that an effort would be made to establish such a line and named the night upon which the Street Committee would meet to act upon the petition of the property holders, asking the establishment of the building line; that there was no doubt of the fact that the said Eubank
21 knew when and where the committee would meet, before the meeting was held, and that he knew the meeting was to be held to consider and act upon the establishment of a building line on the side of the square on which his property fronts.

And the defendant, J. E. Eubank, to sustain the issue on his part, introduced the following evidence:

The defendant, J. E. EUBANK, being sworn in his own behalf, testified that he is the owner of the lot of land on which the said house is built; that he signed said application for the permit to erect the said dwelling house; that said permit was accompanied by plans and specifications which showed the said bay-window, or octagon bay; that he is the owner of the said lot of land up to the street line; that the street line is about fourteen feet north of said alleged building line; that, at the time said permit was granted for said dwelling house, the Building Inspector, H. P. Beck, approved the said plans and specifications; that the said house had been practically completed in exact accordance with said plans and specifications, and as provided for in said permit; that, on the 9th of January, 1909, he was notified by the said Building Inspector that the house must be set back so that all parts of it, including the bay window, or octagon bay, should not be less than fourteen feet from said street line; that he thereupon appealed to the Board of Public Safety, and it took the action set out in the testimony of the said H. P. Beck; that thereupon a fine of $25.00 was imposed upon him, on February 17th, 1909, by the Police Justice of the City of Richmond, as appears by the warrant in this cause; that he took an appeal from the Police Court to the Hustings Court from the imposition of said fine.

Then said J. E. Eubank also testified that he was not shown the petition of the property owners for the establishment of the alleged building line. But he was cognizant of the fact that a petition would be presented to the Committee on Streets, and of the time and place where the same would be presented, asking the establishment of a building line which, if so established, would affect his property. He offered to prove by S. L. Thomas, one of the parties who had signed said petition, that the said party did so under the impression

and belief that J. E. Eubank intended to erect the said house up to the street line, and not fourteen feet back from said line, but that the court refused to permit said witness to testify; that said house is an ornament to the neighborhood, and that it greatly adds to the value of the property on the square where it is built.

He further testified that the materials used in the construction of said house were as provided for in the said permit, and that
22 he had in no way departed from the terms of the permit granted him on December 21st, 1908, and that said permit is the same as that filed with the testimony of the Building Inspector, H. P. Beck. That the building line sought to be established has never been located any more definitely than in the language used in the resolution of the Street Committee that it was "to be on the line of the majority of the houses now erected on the said south side of Grace Street, between 28th and 29th Streets."

And the foregoing being all the evidence in this case, and the court having considered the same, and the arguments of counsel, thereupon entered its final decision, order and judgment in this cause, which is in the words and figures following, to-wit:

"This day came the City of Richmond by H. R. Pollard, City Attorney, as well as the defendant, by S. S. P. Patteson, his attorney, and neither party requiring a jury, the whole matter of law and of fact is submitted to the judgment and decision of the court, and the court having heard the evidence, it is considered that the judgment of the Police Justice be affirmed, and that the City of Richmond recover against the said J. E. Eubank a fine of twenty-five ($25.00) dollars. To which action of the court in giving judgment against the defendant, the defendant, by his attorney, excepted, and ten days' time is allowed him to prepare his Bill of Exceptions.

The execution of the said judgment is suspended, however, at the request of the defendant for a period of thirty days from this date, in order to allow him time to apply to the Supreme Court of Appeals of Virginia for a writ of error and supersedeas to said judgment."

To which decision, ruling, order and judgment of the court, imposing upon defendant a fine of $25.00, for the alleged violation of said alleged ordinance, the defendant, J. E. Eubank, by counsel, excepted, on the ground that said ordi-ance is null and void; that it is contrary to and in conflict with the 14th amendment to the Constitution of the United States, because it deprives defendant of his property without due process of law, and is in derogation of common law and common right, and prays that this, his Bill of Exceptions may be signed, sealed, ordered to be enrolled and made a part of the record in this case, which is accordingly done on this the 7th day of May, 1909.

S. B. WITT, *Judge*. [SEAL.]

23 A transcript from the Record.
Teste:
WALTER CHRISTIAN, *Clerk*.

STATE OF VIRGINIA,
City of Richmond, To wit:

I, Walter Christian, clerk of the Hustings Court of said city, do hereby certify that notice of this appeal was duly given to the City Attorney by the defendant's attorney as required by law.

Given under my hand this 13th day of May, 1909.

WALTER CHRISTIAN,
Clerk Hustings Court, City of Richmond, Va.

Costs of this transcript, $10.00.

A copy—Teste:

H. STEWART JONES, *C. C.*

24 Hustings Court, City of Richmond.

EUBANK
v.
CITY OF RICHMOND.

Opinion by Judge Stafford G. Whittle.

RICHMOND, VA., *March* 10, 1910.

This writ of error is to a judgment of the Hustings Court of the City of Richmond, affirming a judgment of the police justice of the City imposing a fine upon the plaintiff in error for the violation of the "building line" ordinance.

By Act of the General Assembly of Virginia, passed March 14, 1908, councils of cities and towns are authorized, among other things, "to make regulations concerning the building of houses in the city or town, and in their discretion * * * in particular districts or along particular streets, to prescribe and establish building lines, or to require property owners in certain localities or districts to leave a certain percentage of lots free from buildings, and to regulate the height of buildings," etc. Acts 1908, p. 623-4.

By virtue of this Act, the city council passed an ordinance "That whenever the owners of two-thirds of the property abutting on any street shall, in writing, request the committee on streets to establish a building line on the side of the square on which their
25 property fronts, the said committee shall establish such line so that the same shall not be less than five feet nor more than thirty feet from the street line * * * and no permit for the erection of any building upon such front of the square upon which such building line is so established shall be issued except for the construction of houses within the limits of such line." The ordinance then prescribes a fine of not less than twenty-five nor more than five hundred dollars for its violation.

The controlling question presented by the record is, whether or not the Act of March 14, 1908, is constitutional. If that question

be answered in the affirmative, it will be only necessary for us to enquire whether or not the power granted has been lawfully exercised.

It is well understood and settled by decisions of the highest authority that the Legislature may, in the exercise of the police power, place limitations upon personal rights and the rights of property in the interest of public health, public morals and public safety.

This principle was distinctly announced in the case of Welch v. Swasey, 193 Mass. 364 (118 Am. St. Rep. 523), involving
26 the validity of building regulations made by authority of legislative enactment with respect to the height of buildings and their mode of construction in cities. The application for a mandamus by the plaintiff in error was addressed to the justices of the supreme judicial court of the State of Massachusetts to compel the defendants in error, who constituted a board of appeal from the building commissioner of the city of Boston, to issue a permit to him to build on his lot in that city. The ground of refusal to grant the building permit was because the site for the proposed building was in a district in which the height of buildings was limited to from eighty to one hundred feet, and the height of the proposed building was in excess of the prescribed limit. The case was referred to the full court who held the statute and the action of the commission thereunder constitutional. Upon writ of error to the Supreme Court of the United States, the judgment was unanimously affirmed. Welch v. Swasey, 214 U. S. 91.

In that case both the Supreme Court of Massachusetts and the Supreme Court of the United States decided that the regulation in question was plainly passed by the Legislature in furtherance of "the safety, comfort, or convenience of the people," and,
27 therefore, should be upheld as a valid exercise of police power. It was moreover held (the facts being sufficient to justify the enactment), that the circumstance that considerations of an esthetic nature may also have entered into the reasons which influenced the Legislature could not invalidate the Act.

So, in the present case, the statute is neither unreasonable nor unusual, and we are justified in concluding that it was passed by the Legislature in good faith and in the interest of the health, safety, comfort, or convenience of the public, and for benefit of the property owners generally who are affected by its provisions; and that the enactment tends to accomplish all, or at least some, of these objects. The validity of such legislation is generally recognized and upheld. Freund on Police Power, ss. 118, 128; Smith's Modern Law Mun. Corps., sec. 1322; U. S. ex rel. Strasberger v. Commissioners, 5 Mackey 389, 391; Attorney-General v. Williams 174 Mass. 477; Com'th v. Strauss, 191 Mass. 545; Com-th v. Cotton, 8 Gray, 488; Berger v. Henley, 73 Conn. 536; People v. D'Oench, 111 N. Y. 361; Barbier v. Connolly, 113 U. S. 27; C. B. & Q. Ry. Co. v. Drainage Com'rs, 200 U. S. 561; Bacon v. Walker, 204 U. S. 311, 317.

For these reasons, we are of opinion that the statute is not
28 amenable to objection on constitutional grounds.

The remaining enquiry is whether or not the power

granted by the Legislature has been lawfully exercised by the c
council. The contention under this assignment of error is found
upon the assumption that the city council has delegated functio
arising out of its police power to the committee on streets.

An inspection of the ordinance will show that this assignme
is not well taken. The committee is clothed with no discreti
as to whether a street line shall or shall not be established in a giv
case. The language of the ordinance is mandatory, "that where
the owners of the two-thirds of the property abutting on any str
shall, in writing, request the committee on streets to establish
building line on the side of the square on which their proper
fronts, the said committee shall establish such line."

All that is left to the discretion of the committee in the dischar
of an administrative function is to determine, within prescrib
limits, how far the building line shall be from the line of t
street.

In the case of Welch v. Swasey, supra, the Supreme Court
Massachusetts said: "The delegation to a commission of the d
termination of the boundaries of these parts for the class
29 was within the constitutional power of the general cou
The work of the commissioners under the first Act was n
legislation, but the ascertainment of facts and the application
the statute to them for purposes of administration. Such su
sidiary work by a commission is justified in many cases."

In the case of Ould & Carrington v. City of Richmond, 23 Gra
471, for purposes of taxation the city council divided lawyers in
six classes, and devolved upon the finance committee the duty
assigning them to their appropriate class. It was contended th
this was an illegal delegation of power, but this court held othe
wise and sustained the tax ordinance. See also, Hitchcock v. Ga
vestion, 96 U. S. 348; Union Bridge Co. v. U. S., 204 U. S. 378
387; St. Louis &c. R. Co. v. Taylor, 210 U. S. 287.

Their other contentions — of minor importance, but they are wit
out merit and need not be discussed.

We find no error in the judgment of the Hustings Court, and
must be affirmed.

Affirmed.

30 VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building, in the City of Richmond, on Thursday, the 10th day of March, 1910.

J. E. EUBANK, Plaintiff in Error,
against
CITY OF RICHMOND, Defendant in Error.

Upon a Writ of Error and Supersedeas to a Judgment Rendered by the Hustings Court of the City of Richmond on the 28th Day of April, 1909.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the said judgment. It is therefore considered that the same be affirmed, and that the plaintiff in error pay to the defendant in error damages according to law, and also its costs by it expended about its defence herein.

Which is ordered to be certified to the said Hustings Court.

A Copy.
Teste:
H. STEWART JONES, *C. C.*

31 In the Supreme Court of Appeals of Virginia, at Richmond.

STATE OF VIRGINIA,
City of Richmond, To wit:

I, H. Stewart Jones, Clerk of the Supreme Court of Appeals of Virginia, at Richmond, do hereby certify that the foregoing printed record contained in twenty three pages and one page of index, and seven additional manuscript pages, is a true and perfect transcript of the record of the suit in the case of J. E. Eubank against City of Richmond, remaining in the Clerk's Office of the said Court at the City of Richmond, Virginia, upon which said record the said case was heard, tried and determined by the court aforesaid.

In witness and attestation whereof I hereunto set my hand and affix the seal of said court at Richmond, Virginia, this 5th day of April, 1910.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk Supreme Court of Appeals of the State of Virginia, at Richmond.

STATE OF VIRGINIA,
City of Richmond, To wit:

I, James Keith, one of the Judges and President of the Supreme Court of Appeals of the State of Virginia, do hereby certify that the foregoing is the true and genuine signature of H. Stewart Jones, the Clerk of said Court at Richmond, and that the said attestation made by him is in due form.

Given under my hand and seal this the 5th day of April, 1910.

JAMES KEITH,
President Supreme Court of Appeals of Virginia.

STATE OF VIRGINIA,
City of Richmond, To wit:

I, H. Stewart Jones, Clerk of the Supreme Court of Appeals of the State of Virginia, do hereby certify that the Honorable James Keith, whose genuine signature is subscribed to the annexed writing, was, at the time of signing the same, President and one of the Judges of the said Court, duly commissioned and qualified.

In witness whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Richmond, the 5th day of April, 1910.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk Supreme Court of Appeals of the State of Virginia at Richmond.

32 *Petition, Assignment, and Prayer.*

Supreme Court of Appeals of Virginia.

No. —.

J. E. EUBANK, Plaintiff,
vs.
CITY OF RICHMOND, Defendant.

Petition for Writ of Error, Assignment, and Errors.

Considering himself aggrieved by the final decision *of* of the Supreme Court of Appeals of Virginia rendered against him in the above entitled case, the plaintiff hereby prays a writ of error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

And the said J. E. Eubank assigns the following errors in the records and proceedings of the said case:

The Supreme Court of Appeals of Virginia erred in holding and deciding that so much of Section 1038 of the Code of Virginia (1904) as amended by Acts of the General Assembly of Virginia,

1908, Acts 1908 p. 624, as authorizes the establishment by cities of building lines on private property without compensation, and the ordinance of the City of Richmond, approved December 7th, 1908, made in pursuance thereof, to be valid.

The said errors are more particularly set forth as follows: The Supreme Court of Appeals of Virginia erred in holding and deciding:

First. That said State statute and city ordinance did not deprive citizens, or this plaintiff of property, by taking it from them,
33 or him, without due process of law and without any compensation, as guaranteed by the Fourteenth Amendment to the Constitution of the United States;

Second. That said State statute and city ordinance did not deprive the plaintiff of the equal protection of the laws and confiscate his property without any compensation and without due process of law, contrary to the express guarantee of said Fourteenth Amendment to the Federal Constitution;

Third. That said city ordinance was valid and that the fine of $25.00 imposed upon the plaintiff was lawful.

For which errors, the plaintiff, J. E. Eubank, prays that the said judgment of the Supreme Court of Appeals of Virginia, dated March 10, 1910, be reversed, and a judgment rendered in favor of the plaintiff and for costs.

S. S. P. PATTESON,
Attorney for J. E. Eubank.

STATE OF VIRGINIA,
Supreme Court of Appeals of Virginia, To wit:

Let the writ of error issue upon the execution of a bond by J. E. Eubank to the City of Richmond, in the sum of $200.00 two hundred dollars; such bond, when approved, to act as a supersedeas.

Dated March 30, 1910.

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

34 Copy.

Supreme Court of the United States.

J. E. EUBANK, Plaintiff in Error,
vs.
CATY OF RICHMOND, Defendant in Error.

Bond.

Know all men by these presents, That we, J. E. Eubank, as principal, and S. S. P. Patteson and A. D. Ellis,, as sureties, are held and firmly bound unto the City of Richmond, in the sum of —, to be paid to the said City of Richmond, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this — day of March, 1910.

Whereas, the above-named plaintiff in error seeks to prosecute his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of Appeals of Virginia,

Now, therefore, the condition of this obligation is such that if the above-named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

(Signed) J. E. EUBANK. [SEAL.]
" S. S. P. PATTESON. [SEAL.]
" A. D. ELLIS. [SEAL.]

35 STATE OF VIRGINIA,
City of Richmond, To wit:

S. S. P. Patteson and A. D. Ellis being each duly sworn, on oath depose and say: We are each of lawful age and are citizens of the State of Virginia, and know the contents of the foregoing instrument to which we have attached our names. We each for himself say that we are worth the sum of two hundred dollars ($200.00) over and above all debts, liabilities and exemptions.

(Signed) S. S. P. PATTERSON.
" A. D. ELLIS.

Subscribed and sworn to before me this 30 day of March, 1910.

(Signed) P. ALBERT SMITH,
Notary Public.

My Commission expires on the 27 day of Febr'y, 1914.

The above bond is approved.

(Signed) JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

[Endorsed:] Bond. Received & filed April 5, 1910. H. Stewart Jones, Clerk.

36 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between J. E. Eubank, and the City of Richmond, a municipal corporation, wherein was

drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said J. E. Eubank, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judg-

37 ment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 5th day of April, in the year of our Lord one thousand nine hundred and ten.

[Seal United States Circuit Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
Clerk Circuit Court United States,
Eastern District of Virginia.

Allowed:
JAMES KEITH,
President Supreme Court of Appeals of Virginia.

[Endorsed:] Writ of error. Received & filed April 5, 1910.

38 THE UNITED STATES OF AMERICA, *To wit:*

The President of the United States to J. E. Eubank, of Richmond, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of Appeals of Virginia, wherein J. E. Eubank is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the President of the Supreme Court of Appeals of Virginia, this 5 day of April, 1910.

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

Attest:

H. STEWART JONES,
Clerk of the Supreme Court of Appeals of Virginia.

RICHMOND, VIRGINIA, *April* 5, 1910.

I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

H. R. POLLARD,
Attorney for City of Richmond.

39 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Appeals of Virginia, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Appeals, in the City of Richmond, this 3rd day of May, 1910.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

Endorsed on cover: File No. 22,144. Virginia Supreme Court Appeals. Term No. 272. J. E. Eubank, plaintiff in error, vs. The City of Richmond. Filed May 7th, 1910. File No. 22,144.

Office Supreme Court, U. S.
FILED.
MAR 28 1912
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911

No. 48.

J. E. EUBANK, PLAINTIFF IN ERROR

vs.

THE CITY OF RICHMOND

In Error to the Supreme Court of Appeals of the State of Virginia.

BRIEF OF ARGUMENT OF PLAINTIFF IN ERROR.

S. S. P. PATTESON, Counsel.

RICHMOND PRESS, INC., PRINTERS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911

No. 272

J. E. EUBANK, PLAINTIFF IN ERROR

vs.

THE CITY OF RICHMOND

In Error to the Supreme Court of Appeals of the State of Virginia.

BRIEF OF ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT.

This case comes up on a writ of error from the final decision of the Supreme Court of Appeals of Virginia, rendered on March 10th, 1910 (110 Va. 749.) J. E. Eubank, the plaintiff in error, is a citizen of the City of Richmond and is the fee simple owner of the house and lot on East Grace Street between 28th and 29th Streets, on Church Hill in said city, known as No. 2803 East Grace Street (Record p. 8). The said lot fronts 34 feet, one inch on the South side of East Grace Street and extends back between parallel lines 111 feet to an alley in the rear 4 feet wide.

On the 19th day of December, 1908, the said Eubank

applied to H. P. Beck, the Building Inspector of the City of Richmond, for permission to erect a detached brick dwelling house on the said lot in accordance with the plans and specifications which were then filed with said Building Inspector, and on the 21st day of December, 1908, the said plans and specifications were approved and the permit to build granted by him. (Record pp. 14 and 15.) An inspection of the said permit and plans shows that they minutely describe the dimensions, height, width and depth of the proposed dwelling house, and the materials out of which it was to be constructed, and out of which it was in fact afterwards constructed. The application was in no way changed or modified by the Building Inspector. The 20th question in the said application contained these words:

"Are there any bay-windows?" To which this answer was made: "Yes, height 28 feet; width 12 feet; projection 3." (Record p. 14.)

There was another material question asked, (No. 26, Record p. 15) as follows:

"Distance of the building from the street line?" To which the answer was, "Fourteen feet."

The testimony shows that as soon as the permit was granted, Eubank began to assemble the materials for the erection of the said dwelling house and began digging for the foundation walls. However, as it was near the Christmas holidays, very little work was immediately done. But at the time the said permit was granted, there was no building line ordinance in Richmond on that street, the location of the house being fixed on his own land by the plaintiff in error, and such location being approved as above stated.

On the 7th day of December, 1908, the City of Richmond, had adopted what is known as the building line ordinance, which is printed in full on page 7 of the Record. On the 9th day of January, 1909, acting under the power conferred by the said ordinance, the Committee on Streets of the City Council met and fixed a building line to meet Eubank's case by adopting a resolution, which resolution provided for establishing "A BUILDING LINE ON SAID SOUTH

SIDE OF GRACE STREET BETWEEN 28th STREET AND 29th STREET, THE SAID LINE SO ESTABLISHED TO BE ON A LINE OF A MAJORITY OF THE HOUSES NOW ERECTED ON THE SAID SOUTH. SIDE OF GRACE STREET, BETWEEN 28th AND 29th STREETS." (Record p. 11.) No plan was on file, nor did any blue print accompany the application for establishing such line, though the application so stated. (Record p. 11.) On the same day the clerk of the Street Committee wrote the Building Inspector of the adoption of this resolution, and the Building Inspector wrote Eubank of such action of the said Committee. In his communication, that official notified Eubank that the building line was "about" 14 feet from the true line of the street and that all portions of "your house" must be "set back to comform to this line." (Record p. 12.)

The Building Inspector testified on oath that the said dwelling house built by J. E. Eubank in pursuance of said permit in every way complies with the city ordinances, and the said permit, with the exception that the bay-window extends some three feet on Eubank's own land, over the aforesaid building line. These are the undisputed facts.

Eubank declined to set his house back in accordance with the arbitrary and unlawful action of the Committee on Streets. Thereupon, he was summoned to the Police Court on the 28th day of January, 1909, to show cause why he should not be fined for failure to comply with said ordinance; and in pursuance of said summons, was fined on February 17th, $25.00 and costs. Thereupon he gave bond and immediately appealed to the Hustings Court of the City of Richmond, and on the 28th day of April, 1909, a jury having been waived, that court affirmed the said judgment of the Police Court. From this judgment, the plaintiff in error was given time to apply to the Supreme Court of Appeals of Virginia, for a writ of error and supersedeas, which that court awarded on May 20th, 1909.

While these proceedings were pending the house was completed and is now occupied as a dwelling house as ori-

ginally contemplated. It is in the oldest part of the City of Richmond, being but a few squares distant from old St. John's Church, where Patrick Henry made his famous speech on liberty, at the beginning of the Revolution, in the eighteenth century. There is not one word in the testimony that can be distorted into anything to bring this case within the limits of the most elastic conception of the police power. There is nothing in it to show that the public health, safety, comfort, morals or convenience, are in any way involved. The application for the permit, if carefully read, will show all of the circumstances under which the permit was granted and all of the facts of the case, and the defendant city has not attempted to controvert any of them. The plaintiff in error is the fee simple owner of the house and lot; the building is entirely on his own land, and the house is constructed of materials approved by the officer, whose duty it is to grant permits to build, so that the sole question to be determined is, HAS THE LEGISLATURE THE POWER TO AUTHORIZE THE CITY OF RICHMOND TO TAKE FROM HIM THE RIGHT TO BUILD ON THE SURFACE OF HIS OWN GROUND? This particular question has never been passed upon by this Honorable Court.

There is no precedent for the peculiar manner in which the city attempted to fix the building line complained of, and thus take away the rights of the owner. The record shows that there were eleven owners, including Eubank, of lots and houses on that South side of the square in question and, that without notice to Eubank, nine of them signed the petition, asking to have the line established. (Record p. 10.) This square had been within the city limits more than a century before the attempted establishment of any building line.

ASSIGNMENT OF ERRORS.
(Record pp. 22 and 23).

The Supreme Court of Appeals of Virginia erred in holding and deciding that so much of Section 1038 of the Code

of Virginia (1904) as amended by Acts of the General Assembly of Virginia, 1908, Acts 1908, p. 624, as authorizes the establishment by cities of building lines on private property without compensation, and the ordinance of the City of Richmond, approved December 7th, 1908, made in pursuance thereof, to be valid.

The said errors are more particularly set forth as follows: The Supreme Court of Appeals of Virginia erred in holding and deciding:

First. That said State statute and city ordinance did not deprive citizens, or this plaintiff of property, by taking it from them, or him, without due process of law and without any compensation, as guaranteed by the Fourteenth Amendment to the Constitution of the United States:

Second. That said State statute and city ordinance did not deprive the plaintiff of the equal protection of the laws and confiscate his property without any compensation and without due process of law, contrary to the express guarantee of said Fourteenth Amendment to the Federal Constitution;

Third. That said city ordinance was valid and that the fine of $25.00 imposed upon the plaintiff was lawful.

Argument.

While the Supreme Court of Appeals of Virginia decided against the plaintiff in error, the reporter does not state the facts on which it rendered its decision, nor does the court state the facts, in its opinion. Therefore, unless an examination of the record is carefully made, no one can tell what was the exact question before that court. It is impossible to discover it by reading the decision, as the language used deals only in generalities. The contention of the plaintiff in error was, and the same contention is now made here, that the action of the Hustings Court of Richmond, in imposing a fine upon him of $25.00, was unlawful because said ordinance is contrary to the Fourteenth Amendment to the Constitution of the United States, in that it deprives him of his property without due process of law and

without compensation, and is in derogation of common law and common right (Record p. 17). The court does not notice this assignment of error in its opinion. But makes use of an expression, which is not supported by any authority which it cites, and which gives a most dangerous idea of the indefinite enlargement of the police power, not for the benefit of the public but "FOR THE BENEFIT OF THE PROPERTY OWNERS GENERALLY, WHO ARE AFFECTED BY ITS PROVISIONS." In order that no injustice may be done that Honorable Court, the whole sentence is quoted, which is as follows: "So in the present case, the statute is neither unreasonable nor unusual, and we are justified in concluding that it was passed by the Legislature in good faith, and in the interest of the health, safety, comfort or convenience of the public, and for the benefit of the property owners generally who are affected by its provisions; and that the enactment tends to accomplish all, or at least some of these objects." (110 Va., top page 752). There were but four judges of the court sitting; it is composed of five.

It is most earnestly and respectfully insisted that the Legislature is without power to pass any statute which deprives an individual of his property without compensation, "FOR THE BENEFIT OF THE PROPERTY OWNERS GENERALLY." By the use of that language quoted, the court added greatly to the police power, and cut in on the rights of individual property owners, and made it possible for a private citizen's immediate neighbors to take away his constitutional rights for their own benefit, without in any way compensating him, and without conferring any general benefit upon the public at large. Of the cases cited by the court, only one relates to building lines on the surface of the ground, and that is the Connecticut case of *Berger* v. *Henley*, 73 Conn. 536, 48 Atl. 215. But in that case the act of the Legislature under which the line was established, provided for compensating the owner in damages for the land so taken. It recognized the right of the owner to be paid for the land so taken for public use, and it does not contem-

plate the establishment of a building line on private property used for residential purposes, under the police power. The principal case relied upon by the court for the conclusion it reached is *Welch* v. *Swasey*, 214 U. S. 91. It is most earnestly insisted that it is not authority for the establishment of a building line on the surface of the ground, as it deals with the height of buildings only. The ablest writer on municipal law in this country, Judge Dillon, Municipal Corp., 5th ed., §596, says:

> "Statutory restrictions upon the height of buildings having been before the courts incidentally and the opinion having been expressed that statutes regulating the height of buildings are a proper and valid exercise of the police power; the question came directly before the Supreme Judicial Court of Massachusetts, which held that the Legislature, in the exercise of the police power, may regulate the height of buildings in cities so that none can be erected above a prescribed number of feet; that it can classify parts of a city so that in some parts one height is prescribed and in others a different height; that it can delegate to a commission the determination of the boundary of these different parts so as to conform to the general provisions of the statute; and that it can also delegate to a commission the making of rules and regulations in such manner as to permit different heights in different places according to the different conditions in different parts of one of the general classes of territory as defined in the general statute.
>
> The grounds upon which the court sustained this exercise of the police power were that buildings may be erected to such a height as materially to exclude sunshine, light and air, and thus affect the public health, and they might also increase the danger to persons and property from fire. These and other matters in which the extreme height of buildings may affect the public interests seem to us to be sufficient to justify the ex-

> ercise of the police power in this respect, and the general competency of the Legislature under the police power to regulate the height of buildings in cities does not appear to us to be open to any serious question."

It is clear that the decision in that case is in harmony with the general view of the police power. The facts there are so entirely unlike the facts in the case at bar, that it is not authority for the city's contention in the Eubank case now being considered.

The act of the General Assembly of Virginia under which the ordinance complained of was enacted, is to be found in the Acts of 1908 at p. 624. It is the State statute conferring general powers on cities in Virginia. The portion of the statute applicable to the present case, is as follows:

> * * * * * "the council of every city and town shall have power to * * * * *

It appears that the Legislature confers power on the Council "on the petition of the owners of not less than two-thirds of the ground included in any square, to prohibit the erection in such square of any building, or an addition to any building more than ten feet high, unless the outer walls thereof be made of brick and mortar, or stone and mortar, and provide for the removal of any building or addition erected contrary to such prohibition." This language is plain, and whether the power conferred is lawful or not, it does not arise in Eubank's case because the city ordinance does not provide for securing the petition of two-thirds of the persons owning an entire square. Yet the Supreme Court of Appeals of Virginia, quotes this language (*Eubank* v. *Richmond*, 110 Va. 750) as being applicable to the residents of one side of a square for the establishment of a building line on that one side only. What the act in fact provides is, that the city may, IN PARTICULAR DISTRICTS, OR ALONG PARTICULAR STREETS, PRESCRIBE AND ESTABLISH BUILDING LINES, OR REQUIRE OWNERS IN CERTAIN LOCALITIES OR DISTRICTS TO LEAVE A CERTAIN PERCENTAGE OF LOTS FREE FROM BUILDINGS. The city enacted its ordinance under this provision and not under the provision relating to squares. The Legislature has not prescribed the method by which the city is to take the confiscatory step of establishing building lines on private property without compensation to the owners. The language of the ordinance shows that it is a very crude piece of legislation. The case of *Strasberger* v. *Commissioners*, 5 Mackey's Rep. 393, is also cited as authority by the Supreme Court of Appeals of Virginia for the conclusion it reached. But this case arose in the District of Columbia, in the City of Washington, and it was concerning the erection of a theatre. Under the generally accepted definition of the police power, that court doubtless reached the correct conclusion.

The case of *Kemp* v. *D'Oench*, 18 N. E. 862 (N. Y.), was about the height of buildings, and not about the use of the

surface of the ground. A most diligent search has failed to result in the discovery of a single case, either in this or any foreign country where the city or any other power had been permitted to establish a building line on the surface of ground privately owned without compensation to the owner.

In the following cases, which are somewhat like the case at bar, to-wit: *City of Chicago* v. *Pittsburg*, etc. *Ry. Co.*, 91 N.E., 422 (Illinois); *State* v. *Clausen*, 117 Pacific, 1101 (Washington); and *May* v. *Craig*, 109 Pacific, 842 (California), the courts held that under the guise of the police power neither the city nor the State could invade private rights. In the case of *Chicago* v. *Pittsburg etc. Ry. Co.*, they said:

> "But the Legislature cannot, under the guise of police regulations, arbitrarily invade personal rights or private property. There must be some obvious and real connection between the actual provisions of police measures and their assumed purpose. Counsel also lose sight of the rule of law that where power to legislate on a given subject is conferred on a municipal corporation, and the details of the legislation are not prescribed by the Legislature, it is implied that the power will be reasonably exercised." *City of Chicago*, v. *Pittsburg etc. Ry. Co.*, 91 N. E., 423.

In the exact form in which this case is presented to this Honorable Court, it has arisen once before only. It came up in the case of *City of St. Louis* v. *Hill*, 116 Mo. 527, 22 S. W. 861. There it came up under what is known as the "Boulevard Law." By examination of that case it will be seen that the stature was a very elaborate one. The Missouri Constitution provides (Sec. 21) "that private property shall not be taken or damaged for public use without just compensation." The Virginia Constitution provides that the Legislature "shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation." (Sec. 58). The St. Louis ordinance pro-

vided that the city might establish a building line on a boulevard to which all structures must conform, with no provision for compensation to the owners, the building line to be forty feet from the street line. The court held the statute and ordinance both to be unconstitutional and void. In delivering the opinion of the court Sherwood, Judge, said:

> "It is urged on behalf of the plaintiff that there has been no "*taking*" of private property under this law and ordinance because the "*title*" to the property and the right to use the same are still in the defendant. This contention brings into prominence the true import of the word "*property*."
>
> The general result of various definitions of the term is that it is the exclusive right of any person to freely use, enjoy and dispose of any determinate object, whether real or personal. 1 Blackstone's Commentaries, 138; 2 Austin's Jurisprudence, 817, 818; 19 American and English Encyclopedia of Law, 284, and cases cited; Lewis on Eminent Domain, secs. 57, 58, 59; *Eaton* v. *Railroad*, 51 N. H. 504; *Thompson* v. *Improvement Co.*, 54 N. H. 545; *Wynehamer* v. *People*, 13 N. Y. 378. Sometimes the term is applied to the thing itself, as to a horse or a tract of land; these things, however, though the *subjects* of property are, when coupled with possession, but the *indicia*, the visible manifestations of invisible rights, "the evidence of things not seen."
>
> Property, then, in a determinate object, is composed of certain constituent elements, to-wit: The unrestricted right of *use, enjoyment and disposal*, of that object. It follows from this premise that anything which destroys or subverts any of the essential elements aforesaid is a taking or destruction *pro tanto* of *property*, though the possession and power of disposal of the land remain undisturbed, and though there be no actual or physical invasion of the *locus in quo*. Cooley's Constitutional Limitations (6 Ed.), 670; *Wynehamer* v.

People, 13 N. Y. *loc. cit.* 433, per Selden, J.; *People* v. *Otis*, 90 N. Y. *loc. cit.* 52, per Andrews, C. J.

The *use* of a given object is the most essential and beneficial quality or attribute of property; without it all other elements which go to make up property would be of no effect. If the city were allowed to deprive the defendant of the use of his entire lot, it would leave in his hands but *a barren and barmecidal title*; and what is true of property rights as an *integer* is true of each fractional portion.

If plaintiff's theory be correct, then the city could pass and enforce an ordinance which would deprive defendant of the use of his *entire lot*, and still there would be no "taking" within the terms of section 21, article 2, of the constitution, and consequently no right to compensation. The statement of such a position is sufficient to accomplish its utter repudiation.

The day before the ordinance went into operation, defendant had the unquestionable right to build at will on his lot; the day afterwards, he was as effectually prevented from building on the forty-feet strip, except under peril of punishment, as if the city had built a wall around it, and this too without any form of notice, any species of judicial inquiry, or any tender of compensation. If this is not a "*taking*" by *mere arbitrary edict*, it is difficult to express in words the meaning which should characterize the act of the city."

No one can distinguish the principle of the Hill case from the Eubank case. It was cited in argument in the Supreme Court of Appeals of Virginia, but the court did not see fit to notice it in its opinion. In the New York case of *People* v. *Calder*, 85 N. Y. S. 1017, similar legislation was held to be unconstitutional, and in the case of *Byrnes* v. *Riverton*, 64 N. J. L. 210, that court reached a like conclusion.

In the case of *Philadelphia* v. *Linnard*, 97 Pa. St. 242, on a law substantially like the ordinance complained of, the court of last resort has held that legislation of that char-

acter is constitutional, but that the property owners affected by it may recover compensation. We have the question as it relates to the surface of the ground, passed on by Connecticut, New York, New Jersey, Pennsylvania, Virginia and Missouri, six States, and five of the six, reaching the opposite conclusion to Virginia. All of the courts acted independently and all reached their conclusions from their several investigations. The reasoning of the majority of the courts is far more in consonance with the universally accepted views, than the opinion of the Supreme Court of Appeals of Virginia.

The case of *Eubank* v. *City of Richmond* is reported and annotated in 19 Ann. Cases, 186 with an elaborate note, and the editor does not cite any case from any other jurisdiction in support of the Virginia decision. He did not do so, because there are none. It could hardly be said that this is a case of the exercise of the police power for esthetic purposes for the reason, that few, if any persons could be found who would imagine that a street such as Grace Street in the City of Richmond, could be beautified by permitting two-thirds of the owners on one side of each separate block to require their neighbors to conform to their ideas of beauty by moving their houses back, or taking off their bay-windows. Their conceptions of beauty might seem to such owners as important as the views of the Three Tailors of Tooley Street, who petitioned Parliament as "we the people of England," and yet the street would be a zig-zag line of great ugliness.

The Supreme Court of Illinois, in the recent case of *Haller Sign Works* v. *Physical School*, 34 L. R. A. (N. S.) 1004, has reviewed the authorities relating to the exercise of the police power for esthetic considerations. It held the Illinois Statute forbidding the erection of a sign for advertising purposes within 500 feet of a public park or boulevard, unconstitutional and void, saying in conclusion, "The gist of the argument in support of this law is that the police power ought to be extended, both by restriction and compulsion, to the promotion of purely esthetic purposes, upon the ground that the general welfare of the public requires

it. While the general welfare is recognized as one of the principal considerations which will justify an exercise of the police power of the State, still it must be borne in mind that the general welfare of the State is promoted by according each individual the largest degree of personal liberty that is consistent with the best interests of the public."

The regulations governing bay-windows in the City of London, England, are provided for in the London Building Act, 1894, 57 and 58 Vic. ccxii, 2 Encyp. Laws of England, 2d ed., 140, and do not affect the question now under consideration. There is no text writer of authority in this country who asserts that the establishment of a building line on residential private property, without compensation to the owner, is lawful.

Lewis on Eminent Domain, 2d ed. p. 433, §227, states that, "such a law deprives the owner of the lawful use of his property and amounts to a taking thereof within the meaning of the constitution, and consequently can only be carried out by making provision for the compensation of the owner." An exhaustive investigation will satisfy any one that the Supreme Court of Appeals of Virginia has not the shadow of support for holding the plaintiff in error, Eubank, liable to a fine, under the ordinance. Other States have decided questions in favor of the police power as to the right to build beyond a certain HEIGHT in the air on one's own land. But the case of *Eubank* v. *Richmond* is the only case anywhere to be found which holds that such power exists, without compensation to the owner, where the proposed building is a dwelling house erected on the SURFACE of the ground, the materials of which it is constructed having, in every particular, been first approved by the city building inspector. There seems to be a desire on the part of the municipal authorities to carry out the views of the majority of one's neighbors for the time being, as to what lawful use he may make of his private property. In this country we all agree that the majority must rule. Heretofore the majority clothed with such power was confined to a much larger territorial area, such as the county, city, State and nation; it was not conferred on so small a unit as two-thirds of the

residents of one side of a square—in this Eubank case, nine citizens. Does this not make a fetish of majority rule? De Tocqueville, perhaps the ablest foreign critic, who has ever closely investigated our institutions, says:

"If ever the free institutions of America are destroyed, that event may be attributed to the unlimited authority of the majority, which may at some future time urge the minorities to desperation, and oblige them to have recourse to physical force. Anarchy will then be the result, but it will have been brought about by despotism.

Mr. Hamilton expresses the same opinion in "The Federalist," No. 51: 'It is of great importance in a Republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.

Justice is the end of government. It is the end of civil society. It ever has been, and ever will be, pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of Nature, where the weaker individual is not secured against the violence of the stronger; and as in the latter state even the stronger individuals are prompted by the uncertainty of their condition to submit to a government which may protect the weak as well as themselves, so in the former state will the more powerful factions be gradually induced by a like motive to wish for a government which will protect all parties, the weaker as well as the more powerful. It can be little doubted, that, if the State of Rhode Island was separated from the Confederacy and left to itself, the insecurity of right under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of the factious majorities, that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it.'

Jefferson has also thus expressed himself in a letter to Madison: 'The executive power in our government is not the only, perhaps not even the principal, object of my solicitude. The tyranny of the legislatures is really the danger most to be feared, and will continue to be so for many years to come. The tyranny of the executive power will come in its turn, but at a more distant period.' I am glad to cite the opinion of Jefferson upon this subject rather than that of another, because I consider him to be the most powerful advocate democracy has ever sent forth." De Tocqueville's Dem. in America, Vol. 1, Appleton's Ed., pp. 286, 287.

Jefferson and Hamilton disagreed on many subjects. But they both saw with the utmost clearness the danger which might come from an unlimited extension of the majority rule.

As to the question of whether the city council properly exercised the power, if lawfully conferred, the Supreme Court of Appeals of Virginia cites the case of *Ould & Carrington* v. *City of Richmond*, 23 Gratt. 471, as authority for the method pursued. It is respectfully insisted that in that case as the *Finance Committee fixed the license tax itself*, and in the Eubank case *the nine neighbors fixed the building line*, the Ould & Carrington case is not in point. Every time a building line is established under the said ordinance it will be fixed by two-thirds of the residents on one side of a square and not by the city council as the Legislature requires that it shall be. The Legislative act confers no such power. But the contention of the plaintiff in error, is that if it did, it is unlawful because in conflict with the first section of the Fourteenth Amendment to the Constitution of the United States, in that it takes away from and deprives him of his property without due process of law.

All of which is respectfully submitted,

S. S. P. PATTESON.
Counsel for Plaintiff in Error.

Richmond, Va., March 26th, 1912.

In the Supreme Court of the United

OCTOBER TERM, [illegible]

No. [illegible].

J. R. DUBANE, PLAINTIFF IN ERROR

vs.

THE CITY OF RICHMOND.

BRIEF ON BEHALF OF CITY OF RICH[illegible]

H. R. POLLARD,

City Attorney,

For Defendant [illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1911.

No. 272.

J. E. EUBANK, PLAINTIFF IN ERROR

vs.

THE CITY OF RICHMOND.

BRIEF ON BEHALF OF CITY OF RICHMOND.

STATEMENT OF CASE.

This writ of error is taken in a prosecution by the City of Richmond, Va. instituted on the 28th day of January, 1909, before the Police Justice of the city, charging that the plaintiff in error had violated the provisions of an ordinance of the City of Richmond, approved December 7, 1908, entitled, "An ordinance to authorize and require the Committee on Streets to establish a building line on such squares of the city on which the owners of two-thirds of the property abutting thereon shall request the establishment of the same and to prohibit the granting of a permit by the Building Inspector for the erection of any buildng nearer to the street line than the line so established," in which prosecution on February 17, 1909, the plaintiff in error was adjudged guilty of a violation of said ordinance and was accordingly fined the sum of $25.00 and costs (Record, p. 6); from this judgment the plaintiff in error had, as a matter of right, an appeal to the Hustings Court

of the City of Richmond, a court of record of said city, where on April 28, 1909, neither party requiring a jury for the trial of the said appeal, the whole matter of law and of fact was submitted to the judgment of the court, and the court, after hearing the evidence, entered a judgment affirming the judgment of the Police Court and requiring the payment of the fine imposed by the Police Justice (Record, p. 6); to this action of the court the plaintiff in error excepted and filed sundry bills of exceptions which were duly signed and certified by the judge of said Hustings Court and thereafter be presented a petition to the Supreme Court of Appeals of Virginia, assign certain errors to the judgment of the said Hustings Court, on which petition the Supreme Court of Appeals granted a writ of error to the said judgment of the Hustings Court, where on March 10, 1910, the judgment of the Hustings Court was affirmed (Record, p. 21), the said Supreme Court by Stafford G. Whittle, Judge, delivering a written opinion setting forth the grounds therefor. (Record, 18-20).

The errors assigned before the Supreme Court of Appeals of Virginia were:

(1) That the act of the Legislature of Virginia authorizing the establishment of a building line was unconstitutional in that it undertook to appropriate private property for public use without making just compensation therefor; and

(2) That though the Legislature had the constitutional power to authorize the Council of the city to establish a building line, yet the ordinance in this particular case, was, by reason of the express delegation of power to establish such line to the Committee on Streets, which the act of he Legislature did not authorize to be done, void and of no effect.

The errors assigned to the judgment of the Supreme Court of Appeals of Virginia are as follows:

"The Supreme Court of Appeals of Virginia erred in holding and deciding:

"FIRST: That said State statute and city ordinance did not deprive citizens, or this plaintiff of property, by taking it from them or him, without due process of law and without any compensation, as guaranteed by the Four-

teenth Amendment to the Constitution of the United States.

"SECOND: That said State statute and city ordinance did not deprive the plaintiff of the equal protection of the laws and confiscate his property without any compensation and without due process of law, contrary to the express guarantee of said Fourteenth Amendment to the Federal Constitution:

"THIRD: That said city ordinance was valid and that the fine of $25.00 imposed upon the plaintiff was lawful." (Record, p. 23).

The legislative act authorizing the establishment of a building line by cities and towns is in the words and figures following:

"§ 1038. General and enumerated powers of councils of cities and towns.—In addition to the powers conferred by other general statutes, the council of every city and town shall have the power to lay off streets, walks or alleys; alter, improve and light the same, and have them kept in good order; to lay off public grounds and provide all buildings proper for the city or town; to make regulations concerning the building of houses in the city or town, and in their discretion to establish and maintain parks, playgrounds and boulevards, and cause the same to be laid out, equipped or beautified, and in particular districts, or along particular streets, to prescribe and establish building lines, or to require property owners in certain localities or districts to leave a certain percentage of lots free from buildings, and to regulate the height of buildings; to make regulations for the purpose of guarding against danger from accidents by fire, and, on the petition of the owners of not less than two-thirds of the ground included in any square, to prohibit the erection in such square of any building, or an addition to any building more than ten feet high, unless the outer walls thereof be made of brick and mortar, or stone and mortar, and provide for the removal of any building or addition erected contrary to such prohibition." * * * (Code of Va., 1887, as amended by the Act of the General Assembly, approved March 14, 1908, Acts of General Assembly, 1908, p. 623-624).

The ordinance, the legality of which was called in question is in the words and figures following:

"AN ORDINANCE

(Approved December 7, 1908).

To authorize and require the Committee on Streets to establish a building line on such squares of the city on which the owners of two-thirds of the property abutting thereon shall request the establishment of the same and to prohibit the granting of a permit by the Building Inspector for the erection of any building nearer to the street line than the line so established.

Be it ordained by the Council of the City of Richmond:

1. That wherever the owners of two-thirds of the property abutting on any street shall, in writing, request the Committee on Streets to establish a building line on the side of the square on which their property fronts, the said Committee shall establish such line so that the same shall not be less than five (5) feet nor more than thirty (30) feet from the street line, and upon the establishment of such building line it shall be the duty of the Committee on Streets to certify that fact to the Building Inspector of the City of Richmond, who shall record the same in a book in his office to be kept for that purpose, and no permit for the erection of any building upon such front of the square upon which such building line is so established shall be issued, except for the construction of houses within the limits of such line.

2. Any person constructing a building nearer to the street line than the building line established by authority of this ordinance, shall be liable to a fine of not less than twenty-five, nor more than five hundred dollars for each offense, recoverable before the Police Justice of the City of Richmond.

3. This ordinance shall be in force from its passage." (Certain ordinances and Resolutions of the Council of the City of Richmond, 1908-1910, p. 27; incorporated in Richmond City Code, 1910 as Sec. 45 of Chapter 35, p. 315).

The record discloses the fact that at the meeting of the Committee on Streets, held on January 9, 1909, the owners of more than two-thirds of the property abutting on the south side of Grace street, between 28th and 29th streets, in the City of Richmond, Virginia, requested said Committee, in pursuance of the said

ordinance of December 7, 1908, to establish a building line on the south side of said Grace street between 28th and 29th streets, so that the same be not less than five nor more than thirty feet from the street line, and that its action in the premises be certified to the Building Inspector of the City of Richmond (Record, p. 9); and thereupon the said Committee adopted a resolution in the words and figures following:

> "Be it resolved by the Committee on Streets of the City of Richmond, that in accordance with an ordinance, approved by the Mayor, December 7, 1908, entitled An Ordinance "to authorize and require the Committee on Streets to establish building line, etc., etc." and in accordance with the petition of the owners of more than two-thirds of the property fronting on the south line of Grace street, between 28th street and 29th street to have a building line established on said block, the Committee on Streets do hereby establish a building line on said south side of Grace street between 28th street and 29th street, the said line so established to be in the line of a majority of the houses now erected on the said south side of Grace street between 28th and 29th streets." (Record, p. 11).

Of this action on the part of the Committee on Streets the plaintiff in error was, by a communication addressed to him, on January 9, 1909, duly informed. (Record, p. 12).

It was shown by the evidence adduced before the trial court that "though a part of the material had been assembled for the construction of the said dwelling house at the time of the ordinance was passed, no actual contruction work had been done on said dwelling." (Record, p. 12).

The evidence further showed that the Building Code of the City of Richmond gave an appeal from the decisions of the Building Inspector to a board known as the Board of Public Safety, composed of the City Engineer, Mayor of the City of Richmond and Chief of the Fire Department, and that the plaintiff in error being dissatisfied with the ruling of the Building Inspector, that his building could not be constructed within fourteen feet of the line of the street appealed therefrom to the Board of Public Safety, which Board heard said appeal on January 20, 1909, and entered an order that was by the evidence in the case, in the following words and figures:

"Acting under the law and the facts of the case, the Board of Public Safety unanimously sustains the Building Inspector in refusing the permit to build, except in the manner required by the latter of January 9, 1909." (Record, p. 13).

The evidence further shows that of the time and place of the meeting to be held by the Committee on Streets for the consideration of the establishment of the building line, on the particular square in question, the plaintiff in error had notice, but refused to attend. (Record, p. 16).

The record is devoid from start to finish of one scintilla of evidence showing, or tending to show, that the moving consideration of the property owners who petitioned for the establishment of the building line, or that of the Committee on Streets as the representatives of the City of Richmond, or of the Legislature of Virginia in enacting the statute was "to please the cultivated or aesthetic taste" of said property owners, or of the said Committee, from which it necessarily follows that the claim made in the courts below as well as here, that such was the object in view, is nothing more or less than a bald assumption.

The learned judge, delivering the opinion of the Supreme Court of Appeals of Virginia, thus summarizes the questions presented by the record:

"The controlling question presented by the record is, whether or not the Act of March 14, 1908, is constitutional. If that question be answered in the affirmative, it will be only necessary for us to inquire whether or not the power granted has been lawfully exercised." (Record, p. 18-19).

CASE ARGUED.

The assignments of error hereinbefore set out may all be properly considered under two propositions stated by the Supreme Court of Appeals as presented in the record.

I will, therefore, for convenience and clearness discuss them in reverse order to that stated by that tribunal.

FIRST.

The question whether or not the power granted by the Legislature to cities and towns to establish building lines was lawfully exercised by the Council of the City of Richmond, is not open for consideration in this court.

As set forth above the Council of the City of Richmond did not itself act specifically in the matter of the establishment of the building line in question here; but in pursuance of the Act of the Legislature adopted the ordinance of December 7, 1908, authorizing its Committee on Streets to declare a building line established on any square of the city, wherever the owners of two-thirds of the property abutting on any street should in writing request said committee to establish such line.

It was earnestly contended by the plaintiff in error that this ordinance was illegal because the City Council had thereby delegated functions arising out of its police power to the Committee on Streets. In overruling this contention the Supreme Court of Appeals of Virginia said:

> "An inspection of the ordinance will show that this assignment is not well taken. The committee is clothed with no discretion as to whether a street line shall or shall not be established in a given case. The language of the ordinance is mandatory, that wherever the owners of the two-thirds of the property abutting on any street shall, in writing, request the Committee on Streets to establish a building line on the side of the square on which their property fronts, the said committee shall establish such line."

> "All that is left to the discretion of the committee in the discharge of an administrative function is to determine, within prescribed limits, how far the building line shall be from the line of the street." (Record, p. 20).

The cases cited by the court to sustain this proposition were *Welch* v. *Swasey*, 193 Mass. 364, S. C. 214 U. S. 91; *Ould & Carrington* v. *Richmond*, 23 Gratt. 471; *Hitchcock* v. *Galveston*, 96 U. S. 348; *Union Bridge Co.* v. *U. S.*, 204 U. S. 378, 387; *St. Louis, etc., R. Co.* v. *Taylor*, 210 U. S. 287.

The cases to sustain the contention made under this head that the holding of the State Supreme Court is not reviewable here are numerous and conclusive. Among them I beg to call the attention of the court to *Gundling* v. *Chicago*, 177 U. S. 188, where Mr. Justice Peckham, delivering the opinion of the court, said:

> "Whether there is or is not a delegation of power by the Common Council to the Mayor is not, in this case, a Federal question."

This holding was approved in the case of *Williams* v. *Arkansas*, 217 U. S. 79, 88.

In the case of *Wilson* v. *Eureka City*, 173 U. S. 32, 35, Mr. Justice McKenna, delivering the opinion of the court, said:

> "Whether the provisions of the charter entitled the Council to delegate any power to the Mayor is not within our competency to decide. This is necessarily a State question and we are confined to the consideration of whether the power conferred does or does not violate the Constitution of the United States."

It is therefore submitted that the decision of the Supreme Court of Appeals of Virginia sustaining the validity of the ordinance of December 7, 1908, does not present a Federal question for determination by this Honorable Court on writ of error to a State Court, viz: the Supreme Court of Appeals of Virginia, and as a consequence its determination of said question is foreclosed in this court.

SECOND.

That the Act of the General Assembly of Virginia, approved March 14, 1908, authorizing councils of cities and towns to make regulations concerning the building of houses, and, in their discretion, in particular districts or along particular streets to prescribe and establish building lines or to require

property owners in certain localities or districts to leave a certain percentage of lots free from buildings is constitutional and valid.

It goes without saying that the claim of the city is that the Act of the General Assembly of Virginia was passed in the exercise of the police power resident in every State, which "embraces regulations designed to promote the public convenience or general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety." *Chicago B. & Q. R. Co.* v. *Illinois*, 200 U. S. 561, 592.

McQuillin on Municipal Ordinances, Sec. 32, says:

> "So under proper grant of power, ordinances may establish, on certain streets, building lines and provide that a certain class or character of buildings shall be erected in such district."

The law on this subject is thus stated in 29 Cyc. at page 859, where it is said:

> "Building lines fixed by lawful authority must be observed by an abutting owner. * * * The right to build up to the (street) line is subject to the police power of the municipality, under which a building line back from the street may, for sufficient cause, be established by reasonable ordinance on due notice."

A case of far more than ordinary interest in connection with the general scope of the police power is that of *Bacon* v. *Walker*, 204 U. S. 311. In that case the validity under the Constitution of the United States of a statute of the State of Idaho was called in question, which prohibited any owner of sheep to herd the same, or permit them to be herded, on the land of other persons, or to herd the same, or permit them to be grazed, within two miles of the dwelling house of the owner or owners of any such land.

Mr. Justice McKenna, in the case, in discussing the limits of the police power, with reference to the principles stated in the above cited case, (*Chicago B. & Q. R. R. Co.* v. *Illinois*) at page 317, says:

of an aesthetic nature and for that reason it (the act) constituted unmeasurable interference with the rights of property of the plaintiff in error, and deprived the petitioner of the equal protecton of the laws. The Court, speaking through Mr. Justice Peckham, at page 107 disposes of this contention in the following language:

> "It might well be supposed that taller buildings in the commercial section of the city might be less dangerous in case of fire than in the residential portion. This court is not familiar with the actual facts, but it may be that, in this limited commercial area, the high buildings are generally of fire proof construction; that the fire engines are more numerous and much closer together than in the residential portion, and that an unlimited supply of salt water can be more readily introduced from the harbor into the pipes, and that few women and children are found there in the day time, and very few people sleep there at night. And there may, in the residential part, be more wooden buildings, the fire apparatus may be more widely scattered, and so situated that it would be more difficult to obtain the necessary amount of water, as the residence quarters are more remote from the water front, and that many women and children spend the day in that section, and the opinion is not strained that an undiscovered fire at night might cause great loss of life in a very high apartment house in that district. These are matters which, it must be presumed, were known by the Legislature, and whether or not such were the facts was a question, among others, for the Legislature to determine. They are asserted as facts in the brief of the counsel for the City of Boston. If they are it would seem that ample justification is therein found for the passage of the statutes, and that the plaintiff in error is not entitled to compensation for the reasonable interference with his property rights by the statutes. That in addition to these sufficient facts, considerations of an aesthetic nature also entered into the reasons for their passage, would not invalidate them."

It is submitted that this case cannot be differentiated from the case at bar, for Mr. Blackstone says:

> "Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus*

est usque ad coelum, is the maxim of the law; upwards, therefore no man may erect any building or the like, to overhang another's land; and, downwards, whatever is in a direct line, between the surface of any land and the centre of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word 'land' includes not only the face of the earth, but everything under it, or over it." (2 Blackstone's Commentaries, p. 18).

Therefore, consideration of the same kind which justify the interference with the rights of the property owner to erect a high building in congested portions of the city, must operate equally as well under kindred circumstances to justify the prohibition against the occupancy of all of the space of a lot with structures, for so doing has the effect of shutting off, in a material degree, the co-terminus owners from light and air, essential to the preservation of health, and materially embarassing, if not preventing the convenient operation of appliances necessary for the extiguishment of fire.

Concerning the weight which should be given to the legislative determination of the suitableness of the measures adopted to promote the public welfare, Mr. Justice Peckham, in the last cited case, at page 105, said:

"The particular circumstances prevailing at the place or in the State where the law is to become operative, whether the statute is really adapted, regard being had to all the different and material facts, to bring about the results desired from its passage; whether it is well calculated to promote the general and public welfare,—are all matters which the State court is familiar with; but a like familiarity cannot be ascribed to this court, assuming judicial notice may be taken of what is or ought to be generally known. For such reason this court, in cases of this kind, feels the greatest reluctance in interfering with the well-considered judgments of the courts of a State, whose people are to be affected by the operation of the law. The highest court of the State in which statutes of the kind under consideration are passed is more familiar with the particular causes which led to their passage (although they may be of a public nature) and with the general situation surrounding the subject-matter of the legislation than this court can possibly be. We do not, of course intend to say that under

such circumstances the judgment of the State court upon the question will be regarded as conclusive, but simply that it is entitled to the very greatest respect, and will only be interfered with, in cases of this kind, where the decision is, in our judgment, plainly wrong. In this case the Supreme Judicial Court of the State holds the legislation valid, and that there is a fair reason for the discrimination between the height of buildings in the residential as compared with the commercial districts."

The case of *Rochester* v. *West*, 164 N. Y. 510, brought under review the constitutionality of an ordinance authorized by the Charter of the city, prohibiting the erection of bill-boards exceeding six feet in height on private property, except with the permission of the Common Council, and the court, speaking through Martin, Judge, at page 514, there said:

"It is obvious that its purpose was to allow the common Council to provide for the welfare and safety of the community in the municipality to which it applied. If the defendant's authority to erect bill-boards was wholly unlimited as to height and dimensions, they might readily become a constant and continuing danger to the lives and persons of those who should pass along the street in proximity to them. That the Legislature had power to pass a statute authorizing the city to adopt an ordinance which, if enforced, would obviate that danger, we have no doubt. Nor was it in conflict with any provision of the State or Federal Constitution. The fact that no injury has occurred by reason of the erection of the bill-board in question, or that it is improbable that any such injury will occur therefrom, is not controlling upon the question under consideration. The validity of a statute is not to be determined by what has been done in any particular instance; but by what may be done under it. (*Stuart* v. *Palmer*, 74 N. Y. 183; *Gilman* v. *Tucker*, 128 N. Y. 190, 200.) It is equally true that the validity of a statute or ordinance is not to be determined from its effect in a particular case, but upon its general purpose and its efficiency to effect that end. When a statute is obviously intended to provide for the safety of a community, and an ordinance under it is reasonable and in compliance with its purpose, both the statute and the ordinance are lawful, and must be sustained."

It will be seen by an examination of the case of *State* v. *Hurley*, 73 Conn. 536 (decided in 1901) that the Charter of the Town of Bridgeport, Connecticut, had for ten years or more contained a provision authorizing the establishment of building lines along certain streets in that city, and that in pursuance of said authority the ordinance of the city prohibited the granting of a permit to locate a building on any part of the land between the building line and the line of the street. While the writ of mandamus applied for to compel the issuance of the permit was denied on the ground of laches, yet the case recognizes the constitutionality of such a statute, the contention made by the petitioner for the writ being that the proceeding to establish the building line was irregular and for that reason alone no building line had been established.

Probably the most pronounced declaration of this Honorable Court of its reluctance to reverse the finding of State courts in the matter of police regulation, or, if you please, considered by the State authorities, legislative and judicial, as a matter of police regulation, was made in the case of *Laurel Hill Cemetery* v. *San Francisco*, 216 U. S. 358, 365, where Mr. Justice Holmes, delivering the opinion of the court, said:

> "It may be, in a matter of this kind, where the finding of fact is merely a premise to laying down a rule of law, that this court has power to form its own judgment without the aid of a jury. (Citing cases). But whatever the tribunal, in questions of this kind, great caution must be used in overruling the decision of the local authorities, or in allowing it to be overruled. No doubt this court has gone a certain distance in that direction. (Citing cases). But it has expressed through the mouth of the same judge who delivered the judgment in the case last cited the great reluctance that it feels to interfere with the deliberate decisions of the highest court of the State, whose people are directly concerned. *Welch* V. *Swasey*, 214 U. S. 91, 106. The reluctance must be doubled when, as here, the opinion of that court confirms a specific determination concerning the same spot, previously reached by the body that made the law. (Citing cases).
>
> "But the propriety of deferring a good deal to the tribunals on the spot is not the only ground for caution. *If every member of this bench clearly agreed that burying grounds were centers of safety, and thought the board of supervisors and*

Supreme Court of California wholly wrong, it would not dispose of the case. There are other things to be considered. Opinions still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief."

The same learned jurist, delivering the opinion of the court in the case of *Hudson County Water Company* v. *McCarter*, 209 U. S. 349, 355, uses the following pertient language:

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. *For instance the police power may limit the height of buildings in a city, without compensation. To that extend it cuts down what otherwise would be the rights of property.* But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interests, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.

"It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. *But it is recognized that the State, as quasi- sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned.* *Kansas* v. *Colorado*, 185 U. S. 125, 141, 142; S. C. 206 U. S. 46, 99; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230."

"In the long run," says Professor Seligman, "the economic interests of the community must prevail, for law is nothing but

the crystallization of economic and social imperatives." 25 Pol. Sci. Quarterly, 217.

This Honorable Court, in a larger sense than any other court of the land, has taken judicial cognizance of the every day facts of modern complex, social and industrial life, and has responded thereto with less apparent reluctance than the courts of last resort of most of the States.

Here and now the court may respond to principles deduced from the Constitution, as well established as the written Constitution itself, to, apply one of those principles to "the economic interests" of modern municipal conditions growing out of the necessity for what students of social conditions call the "proper housing of the people"—that is, in part at least, housing conditions which afford to denizens light, air and safety.

While the definition of the police power given in Young's Case, 101 Va. 853, 863, relied on by the plaintiff in error, which is there defined as the "power which a State or municipality has to enact laws or ordinances which pertain to the public safety, the public health and the public morals," is narrower than that laid down by this Honorable Court in the cases hereinbefore cited, especially the case of *Chicago, B. & Q. R. Co.* v. *Illinois, supra*, where it is said that "the police power of a State embraces regulations designed to promote *the public convenience or the general prosperity*, as well as regulations designed to promote the public health, the public morals or the public safety," yet the definition invoked is wide enough for the purposes of this case, for the court must presume that the act of the General Assembly of Virginia, which authorizes the councils of the cities and towns to establish building lines is constitutional and valid.

Prima facie every act of a legally constituted legislative body is constitutional, and the person, who assails an act on that account, must clearly establish his contention. This principle is so well understood as hardly to require the citation of authorities, yet I beg to quote the language of Chief Justice Waite in Sinking Fund cases, 99 U. S. 700, 718, quoted by Mr. Justice Harlan in *Powell* v. *Pennsylvania*, 127 U. S. 678, 684, where he said:

> "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown

beyond a rational doubt. One branch of the government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

Further on in this able opinion of Mr. Justice Harlan, it was said:

"The Legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those procured from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the Legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government."

In the court below the learned counsel for the plaintiff in error in his petition for an appeal to the Supreme Court of Appeals of Virginia (Record, p. 13) has confounded the rule of the *construction* of a legislative act which is apparently in restraint of private rights, with the rule which governs in the determination of the question of the *constitutionality of a statute.*

An examination of the case of *Bostock* v. *Sams*, 93 Md., 400 S. C., 59 L. R. A. 285, relied on to sustain the contention that the presumption should be against the constitutionality of the legislative act will clearly show that in that case there was no express authority in any legislative act for the adoption of the ordinance, the validity of which is drawn in question, but it was sought to show that under certain general powers conferred upon the Council of the City of Baltimore, under section 6 of the Charter of that city, it was authorized to make regulations concerning the erection of buildings which would "guard against dangers to arise from an unsafe construction of buildings, or from constructing them of inflamable

materials, or in such manner as might prove offensive or deleterious to health, or in a way to involve danger to other property, or to life or limb," and it was said by the court concerning the ordinance, that it "contained no suggestion that it was intended to provide for the public safety, nor to safeguard the health or morals of the community, nor to preserve public order, nor in any way to be promotive of any object which calls for the exercise of the police power," which powers were claimed to be summarized by a provision in the Charter, which provided that the city may "pass ordinances for preserving order, and securing property and persons from violence, danger and destruction, protecting the public and city property, rights and privileges from waste or encroachment, and for promoting the general interests and insuring the good government of the city."

The ordinance which was there declared illegal and beyond the power of the council to pass, provided that no permit should be granted, "unless in the judgment of the said judges of the appeal tax court, or a majority of them, the size, general character and appearance of the building or buildings to be erected, will conform to the general character of the buildings previously erected in the same locality, and will not in any way tend to depreciate the value of surrounding improved or unimproved property."

Under such a grant of power to the City of Baltimore in its Charter, the courts, holding the ordinance invalid, said:

> "Since we can find no legislative grant of authority to the City of Baltimore, under its Charter, to enact the provision of municipal legislation upon which we have here to pass, either express, or to be implied from any of the legitimate and recognized powers of the corporation, we are constrained to hold the same *ultra vires* and void."

It is apparent that the conditions that there existed do not confront the court here, for by the express terms of the legislative act, the councils of all of the cities and towns of the Commonwealth of Virginia were expressly authorized "in particular districts or along particular streets, to prescribe and establish building lines or to require property owners in certain localities or districts to leave a certain percentage of their lots free from buildings, and to regulate the height of buildings."

It is therefore respectfully submitted that there is no question concerning the proper construction of the statute, as was the case in *Bostock* v. *Sams*, *supra*, but only whether the *statute, not the ordinance*, is constitutional, for the ordinance in this court, as hereinbefore shown, must stand or fall with the statute, *it having been enacted in pursuance and express authority conferred by the statute.*

Judge Dillon on this particular subject, in section 600 of his work on Municipal Corporations, (5th Ed.) says:

> "Sec. 600. (262) Legislative Authority to Adopt What would Otherwise be Unreasonable Ordinances.—Where the *Legislature, in terms, confer upon a municipal corporation the power to pass ordinances of a specified and defined character*, if the power thus delegated be not in conflict with the Constitution, an ordinance passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words what the Legislature distictly says may be done cannot be set aside by the courts, because they may deem it to be unreasonable or against sound policy. But where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid."

The much quoted and leading case on this subject is *State* v. *Clarke*, 54 Mo. 17, 36, where Napton, Judge, speaking of the provisions of the Charter of the City of St. Louis, authorizing the city "to regulate" bawdy houses, and the objection made by counsel to the ordinance licensing such houses, said:

> "It is naked assumption to say that any matter allowed by the Legislature is against public policy. The best indications of public policy are to be found in the enactments of the Legislature. To say that such a law is of unusual tendency is disrespectful to the Legislature, who, no doubt, designed to promote the morals and health of the citizens. Whether the ordinance in question is calculated to promote the object is a question with which the courts have no concern."

In *District of Columbia* v. *Wagaman*, 4 Mackey (D. C.) 328, it was held that when an ordinance is within the express power granted, the court can only construe the extent of the grant, and has nothing to do with the reasonableness of the ordinance carrying it into effect.

As hereinbefore pointed out by section 1038 of the Code of Virginia, 1887, as amended by an Act approved March 14, 1908, (Acts 1908, p. 623) power was expressly given the cities and towns of this State to pass necessary ordinances for sundry express purposes, among which was the power, "in their discretion, in particular districts or along particular streets, to prescribe and establish building lines, or to require property owners in certain localities or districts to leave a certain percentage of lots free from buildings."

Concerning a similar delegation of power it was said by the Supreme Court of Appeals of Virginia, in the case of *Danville* v. *Hatcher*, 101 Va. 532, et sequa:

> "An ordinance cannot be held to be unreasonable which is expressly authorized by the Legislature. The power of a court to declare an ordinance unreasonable, and therefore void, is practically restricted to cases in which the Legislature has enacted nothing on the subject-matter of the ordinance, and consequently to cases in which the ordinace was passed under the supposed incidental power of the corporation merely.
>
> "Dillon distinguishes ordinances which are, from those which are not amenable to attack in the courts for unreasonableness, as follows:
>
> "'Where the Legislature, in terms, confers upon a municipal corporation, the power to pass ordinances of a specific and defined character, if the power thus delegated be not in conflict with the Constitution, an ordinance thus passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words, what the Legislature distinctly says may be done, cannot be set aside by the courts because they deem it to be unreasonable, or against sound policy.'
>
> "In the ultimate analysis, it is a question of power, and the language of the Charter in question plainly indicates a purpose to invest the City Council with absolute control over the sale of liquor within their territorial jurisdiction.

"When a City Council 'is vested with full power over a subject, and the mode of the exercise of such power is not limited by the charter, it may exercise it in any manner most convenient.'

"Courts cannot run a race of opinions upon points of right, reason and expediency with the lawmaking power."

And in the same case (101 Va., 530-1) the court also said:

"Within the sphere of their delegated powers, municipal corporations have as absolute control as the General Assembly would have if it had never delegated such powers and exercised them by its own enactments, and the courts can no more interfere with the act of the one than the other. To permit such interference would be to deny the existence of discretionary power, and transfer its existence from one co-ordinate branch of the government to another."

And in *Soon Hing* v. *Crowley*, 113 U. S. 710, the court said:

"The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile."

In *Wabash R. R. Co.* v. *Defiance*, 167 U. S. 102, it is stated:

"We are not at liberty to inquire whether the discretion vested in the Common Council of determining this question was wisely exercised: or what the motives were for making the change; * * * These were considerations which might properly be urged upon the Common Council as arguments against the proposed change: but it is beyond the province of the courts either to praise the wisdom, or criticise the unwisdom of such action. The question before us is simply whether the council had the power to make the change, and of this we have no doubt."

In *Strasburger* v. *Commissioners*, 5 Mackey (D. C.) 389, it was held that an act of Congress authorizing the District Commis-

sioners to make and enforce such building regulations as they may deem advisable and giving them the force and effect of an Act of Congress, includes every form of such regulations that the Commissioners may deem advisable, and which may reasonably be considered as a proper subject of such regulations, and further that a provision in the building regulations requiring, as a condition precedent to the issuance of a permit to erect a building for theatrical purposes, *that a majority of the persons residing in the square and those in the opposite square fronting the proposed structure shall signify their approbation of the application*, was not unreasonable and was valid.

I have no dispute with the learned counsel for the plaintiff in error, concerning the elementary authorities and the line of cases relied on by him to sustain his contention that neither a State nor a municipal statute enacted to accomplish purposes purely aesthetic, which embarasses property rights, can be sustained as constitutional. The principle he contends for is thus succintly stated by Mr. Tiedman.

> "Regulations which are designed only to enforce upon the people the legislative conception of artistic beauty and symmetry will not be sustained, however much such regulations may be needed for artistic education of the people." (2 Tiedman State and Federal Contral of Persons and Property, p. 755).

I beg, however, to submit the following observations concerning these authorities and their lack of application to the case at bar.

(1) *There is nothing in the record as hereinbefore set out to sustain the contention that the General Assembly of Virginia enacted the statute for aesthetic considerations only.*

Concerning such a situation, what was said by Mr. Justice Holmes in the case of *Quong Wing* v. *Kirkendall* (decided at the present term of the court) Advance Sheets Supreme Court Reports No. 7, March 1, 1912, p. 192-193 is pertinent. It is there said:

> "It may or may not be that if the facts were called to our attention in a proper way the objection would prove to be

real. But even if, when called to our attention, the facts should be taken notice of judicially, whether, because they are only the premise for a general proposition of law (*Prentis* v. *A. C. L. Ry. Co*, 211 U. S. 210, 227; *South Ottawa* v. *Perkins*, 94 U. S. 260; *Telfair* v. *Stead*, 2 Cranch, 407, 418) or for any other reason, still there are many things that courts would notice if brought before them that before hand they do not know. *It rests with counsel to take the proper steps, and if they deliberately omit them, we do not feel called upon to institute inquiries on our own account.* Laws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way. Therefore, without prejudice to the question that we have suggested, when it shall be raised, we must conclude that so far as the present case is concerned, the judgment must be affirmed." (The italics are mine).

As above pointed out the presumption is in favor of the constitutionality of the act. The failure of the statute to make provision for compensation to the lot owner on account of depriving him of the right to occupy his entire lot with buildings does not invalidate the act, and such a contention is without merit. That contention was made and answered in the case of *Watertown* v. *Mayo*, 109 Mass. 315, 318, in the following language:

"Laws passed in the legitimate exercise of this power are not obnoxious to constitutional provisions, although in some measure interfering with private rights, merely because they do not provide compensation to the individual whose liberty is restrained. He is presumed to be rewarded by the common benefits secured. It differs from the right of eminent domain; which involves the appropriation of private property to public use, and requires, in its lawful exercise, pecuniary compensation for the loss inflicted on the owner. Familiar instances of its exercise are found in all quarantine and fire regulations; and it has been repeatedly recognized and variously applied in the decisions of this court.

"To a great extent the Legislature is the proper judge of the necessity for the exercise of this restraining power. It is not easy to prescribe its limit. The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health or protection against a

threatened nuisance; and when it appears that such is not the real object and purpose of the regulation, courts will interfere to protect the rights of the citizen. But a perversion of this power is not shown by the fact that the business restrained is a necessary and lawful business, which has not yet become a public nuisance in fact, or been declared to be such by the statute. The law most wisely interferes for the protection of the public by preventing in advance threatened and probable injury. Exposure to danger is itself an injury."

"There is nothing in the declared purposes and provisions of the statute in question, which leads us to doubt that it comes within the constitutional exercise of the legislative power. It appears to us to provide, by legal modes, through the agency of local authorities, for a prudent restraint upon a use of property which from its nature may become injurious."

(2) *In order to justify the rejection of the statute as unconstitutional it must be wholly, not partially, for aesthetic purposes.*

The cases in which it has been held that statutes or ordinances were unconstitutional because enacted for the promotion of aesthetic or artistic considerations are numerous, relating generally to regulations which prohibited the erection of bill-boards or undertook to regulate the erction of the same, but I believe, *una voce*, hold that the object of such legislation must appear to have been *inspired wholly by aesthetic or artistic considerations.*

In *Varney & Green* v. *Williams*, 155 Cal. 318: S. C. 21 L. R. A. (N. S.) 741, 743, (decided in 1909) it was said:

"Bearing in mind that the ordinance does not purport to have any relation to the protection of passers-by from injury by reason of unsafe structures, to the diminution of hazard of fire, or to the prevention of immoral displays, we find that the one ground upon which the town council may be thought to have acted is that the appearance of bill-boards is, or may be, offensive to the sight of persons of refined taste."

In *Cockran* v. *Preston*, 108 Md. 220. S. C. 23 L. R. A. (N. S.) p. 1163, (decided in 1910), it was held that the Legislature might limit the height of buildings in a section of the city by which was devoted to fine buildings and works of art, for the purpose of

protecting such buildings and works of art from the ravages
fire.

This case is of especial interest, not only for what was e
pressly determined, but also by reason of the court's suggesti
that "the development of higher civilization and the culture a
refinement of the people has reached the point where the educatio
al value of fine arts, as expressed and embodied in architectur
symmetry and harmony is so well recognized as to give sancti
under some corcumstances to the exercise of this power even f
such purposes," basing the suggestion upon the holding of th
Honorable Court in *Welsh* v. *Swasey*, 214 U. S. 91, where this cou
expressly recognized the validity of the statute though consider
tions of taste and beauty entered in, *as auxiliary to sustain*
where the primary and substansive purposes of the Legislatu
as ordinarily, was for the police protection.

In the case of *Haller Sign Works* v. *Physical Culture Trai*
ing School, 249 Ill. 436; S. C. 34 L. R. A. (T. S.) 998, 1003 (d
cided in 1911), it was held that while the State could not comp
the surrender of private rights in property for purely aesthet
purposes, still, if the primary and substantive purposes of th
Legislature are such as to justify the act, considerations of tas
and beauty may enter in as auxiliary, citing *Welch* v. *Swase*
supra.

No pretense was made in the case, by those asserting the u
constitutionality of the statute, that, if the court could find co
siderations justified by the police power, outside of purposes ord
narily considered aeshetic or artistic, the statute would be in suc
case constitutional.

This is clearly shown by the opinion of the court where it wa
said:

> *"The gist of the argument in support of this law is tha*
> *the police power ought to be extended both by restriction an*
> *compulsion to the promotion of purely aesthetic purposes, upo*
> *the ground that the general welfare of the public requires it.*

Because of this contention, and because of the fact that th
court could find no other considerations justified by the polic
power, outside of, as above stated, aesthetic or artistic considera
tions, the statute was declared unconstitutional.

And in conclusion I beg further to add that it cannot be said in this case that the statute was enacted wholly, if at all, for aesthetic purposes, for the court must and will take judicial notice of the practical effect of the widening of a street in a residential section of a large and populous city like Richmond, and in so doing will not have to appeal strongly to the imagination to find beneficial effects flowing therefrom, which can be conclusively pointed to as sufficient to call into exercise the police power, by which the State may pass laws pertaining to the "public convenience or general prosperity," as well as to promote "the public safety, the public health and the public morals." *Chicago, Burlington and Quincy Railroad Co.* v. *Illinois, supra.*

Respectfully submitted,

H. R. POLLARD,
City Attorney.
For Defendant in Error.

March 20, 1912.